

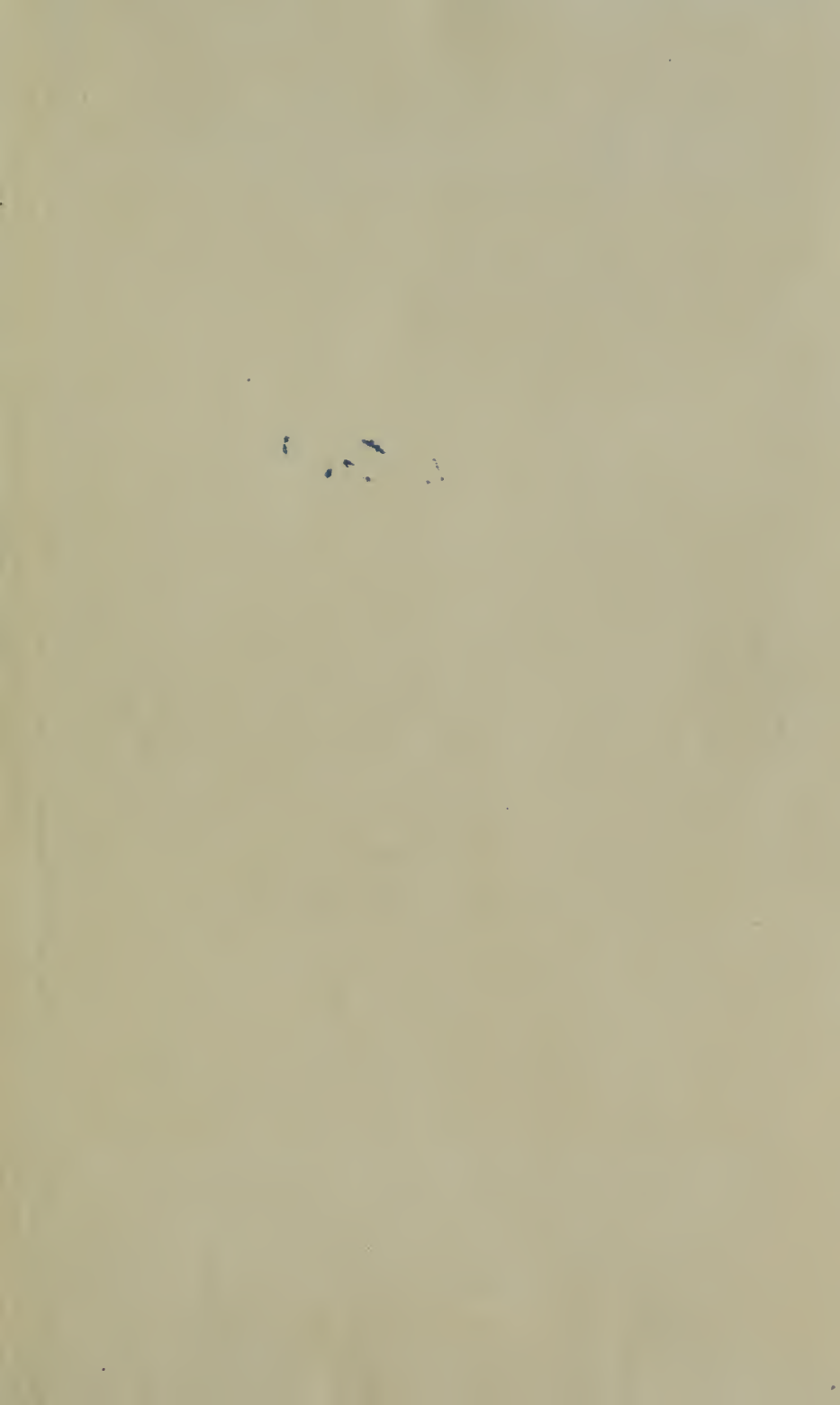
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No. 10334

United States

Vol
2330

Circuit Court of Appeals

For the Ninth Circuit./

SAM SCHNITZER, HARRY J. WOLF, ROSE SCHNITZER
and JENNIE WOLF, individually, and as a co-partnership
doing business under the name and style of Alaska Junk
Company,

Appellants,

vs.

CALIFORNIA CORRUGATED CULVERT COMPANY, a
corporation, and LEO T. CROWLEY, Alien Property
Custodian of the United States,

Appellees.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 381

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

JUN 10 1943

Rotary Colorprint, 590 Folsom St., San Francisco

PAUL P. O'BRIEN,
CLERK

No. 10334

United States
Circuit Court of Appeals
For the Ninth Circuit.

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Amended Designation of Appellants of Parts of Record to be Printed (CCA)	376
Stipulation re	375
Answer	8
Appeal:	
Bond on	84
Certificate of Clerk to Transcript of Record on	93
Designation of Appellants of Content of Record on (DC)	90
Designation of Parts of the Record to be Printed, Appellants Amended (CCA)..	376
Motion for Extension of time to file Record on	86
Notice of	82
Order Directing Transmittal of Original Exhibits on	92
Order Extending time to file Record on..	87
Statement of Points, Appellants (DC)....	88
Statement of Points, Appellants (CCA)..	372
Stipulation re Amended Designation of Record on	375

Index	Page
Bond on Appeal	84
Certificate of Clerk to Transcript of Record on Appeal	93
Complaint	2
Decree, Interlocutory	78
Designation of Appellants of Contents of Rec- ord on Appeal (DC)	90
Designation of Parts of the Record to be Printed, Appellants Amended (CCA).....	376
Stipulation re	375
Exceptions by Defendants to Proposed Find- ings and Conclusions of Law.....	63
Findings of Fact and Conclusions of Law....	66
Interlocutory Decree	78
Motion and Notice of Motion to add Party Plaintiff	18
Affidavit of William S. Graham in Sup- port of	25
Supplement to Complaint	21
Vesting Order of the Alien Property Cus- todian, Exhibit "G"	23
Motion for Extension of time to file Record on Appeal	86
Names and Addresses of Attorneys of Record	1
Notice of Appeal	82

Index	Page
Opinion	61
Order based on Stipulation to Permit Defendants to Incorporate Additional Patents in their Answer	16
Order Directing Transmittal of Original Exhibits	92
Order Extending time to file Record on Appeal	87
Order Substituting Leo. T. Crowley as Party Plaintiff	27
Order Upon Pre-Trial	29
Statement of Points on Appeal, Appellants' (DC)	88
Statement of Points on Appeal, Appellants' (CCA)	372
Stipulation and Order Regarding Reproduction of Exhibits	443
Stipulation re Amended Designation of Record on Appeal	375
Stipulation relative to Pre-Trial Exhibits	28
Stipulation to Permit Defendants to Incorporate Additional Patents in their Answer....	14
Transcript of Proceedings on Trial of Cause..	95
Certificate of Reporter	370
Exhibits for Defendants:	
25—Copy of Patent No. 222,195, dated Dec. 2, 1879, to Theodore J. McGowan, Cincinnati, Ohio	391
Admitted in Evidence	334

Index	Page
Exhibits for Defendants—(Continued):	
27—Copy of Patent 999,169, dated July 25, 1911, to Theodore N. Jones, Boulder, Colorado.....	395
Admitted in Evidence	195
29—Photostatic copy of Patent 685,- 818, dated Nov. 5, 1901, to R. M. Close, Los Angeles, California...	401
Admitted in Evidence	334
32—Photostatic copy of Patent 580,- 084, dated Apr. 6, 1897, to H. H. Gorter, San Francisco, Califor- nia	407
Admitted in Evidence	185
36—Copy of Patent 1,255,577, dated Feb. 5, 1918, to Edward Francis Berry, New Orleans, La.....	413
Admitted in Evidence	189
37—Photostatic copy of Patent 1,448,- 646, dated Mar. 13, 1923, to J. F. Ward, Dunsmuir, Calif.	423
Admitted in Evidence	335
39—Copy of Patent 1,292,524, dated Jan. 28, 1919, to Lemuel W. Ser- rel, Plainfield, New Jersey.....	429
Admitted in Evidence.....	192
40—Copy of Patent 811,812, dated Feb. 6, 1906, to Edward V. Ander- son, Pittsburg, Pa.	433
Admitted in Evidence.....	188

Index	Page
Exhibits for Plaintiffs:	
11—Copy of Patent 1,747,942, dated Feb. 18, 1930, to Karl Lanninger, Frankfort-on-the-Main, Germany.	383
Admitted in Evidence	99
22—Copy of Patent 1,945,293, dated Jan. 30, 1934, to Ralph H. Pierce, Eugene, Oregon	387
Admitted in Evidence.....	295
Witnesses for Defendants:	
Finkbeiner, E. A.	
—direct	255
—cross	258
—redirect	290
McDougall, George F.	
—direct	172, 215
—recalled, direct	290, 350
—cross	291
Pierce, Ralph H.	
—direct	340
—cross	342
Witnesses for Plaintiffs:	
Hanson, Launcelot W.	
—rebuttal, direct	351
—cross	364
Vale, Baldwin	
—direct	102, 130
—cross	136, 159
—redirect	168

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD:—

J. S. MIDDLETON,

1035 Pacific Building, Portland, Oregon,

For Appellants.

THEODORE J. GEISLER and

L. R. GEISLER,

Platt Building, Portland, Oregon, and

WILLIAM S. GRAHAM,

111 Sutter Street, San Francisco, California,

For Appellee, California Corrugated Cul-
vert Co.

CARL C. DONAUGH,

United States Attorney, and

JAMES H. HAZLETT,

Assistant United States Attorney,

For Alien Property Custodian, Portland,
Oregon.

In the District Court of the United States for the
District of Oregon, March Term, 1941.

Be It Remembered, That on the 3rd day of April,
1941, there was duly filed in the District Court of
the United States for the District of Oregon, a Com-
plaint, in words and figures as follows, to wit: [1*]

In the United States District Court for the
District of Oregon

Civil No. 706

CALIFORNIA CORRUGATED CULVERT CO.,
a corporation, and KARL LANNINGER,
Plaintiffs,

vs.

SAM SCHNITZER, HARRY J. WOLF, ROSE
SCHNITZER, and JENNIE WOLF, individ-
ually, and as a co-partnership doing business
under the name and style of ALASKA JUNK
CO.,

Defendants.

BILL OF COMPLAINT FOR INFRINGEMENT
OF LETTERS PATENT

To the Honorable,

The Judges of the Above-Entitled Court:—

The Plaintiffs above-named, California Corru-

* Page numbering appearing at foot of page of original certified
Transcript of Record.

gated Culvert Co., and Karl Lanninger, sometimes known as Karl L. Lanninger, bring this, their Bill of Complaint, against Defendants, Sam Schnitzer, Harry J. Wolf, Rose Schnitzer and Jennie Wolf, as individuals, and as co-partners doing business under the name and style of Alaska Junk Co., and for cause of action allege and say:— [2]

I.

That the Plaintiff, California Corrugated Culvert Co., is a corporation organized and existing under the laws of the State of California and is a resident of said State and has its principal established place of business in the City of Berkeley, County of Alameda, State of California; that the Plaintiff, Karl Lanninger, is a citizen or subject of Germany and a resident of Frankfort-on-Main in Germany.

II.

That upon information and belief the Defendants, Sam Schnitzer, Harry J. Wolf, Rose Schnitzer and Jennie Wolf, are citizens of the State of Oregon and are residents of the City of Portland, County of Multnomah in said State of Oregon, and are co-partners doing business under the name and style of Alaska Junk Co., with an established place of business in the City of Portland, County of Multnomah, State of Oregon

III.

That the grounds upon which the jurisdiction of this Court depends in this suit is that this is a suit

in equity which arises under the laws of the United States relating to Letters Patent for invention; that the Defendants have their respective places of residence within the judicial district of this Court, and also have an established place of business and have committed acts of infringement in said judicial district.

IV.

That on February 18, 1930, United States Letters Patent for invention, No. 1,747,942, were, in compliance with law, duly and regularly issued to the plaintiff, Karl Lanninger, for an improvement in Pipe Line, of which he was the first inventor; that said Letters Patent were granted on an application filed by said Lanninger in the United States Patent Office on October 8, 1923, Serial No. 667,353, based on an application having [3] previously been filed in Germany on October 14, 1922; that subsequent to the issuance of said Letters Patent, and prior to the commencement of this suit, said Karl Lanninger, using his name, including his middle initial, as Karl L. Lanninger, by an instrument in writing dated the 14th day of April, 1937, granted to the Plaintiff, California Corrugated Culvert Co., an exclusive license to manufacture, sell and use the said patented invention in and throughout the United States of America and its possessions for irrigation or water-carrying purposes, and including the right to sub-license others, which said license, at all times since said 14th day of April, 1937, has been and now is in full force and effect; and Plaintiff, California Corrugated Culvert Co., has been and

now is the owner of all rights thereunder, save and except for non-exclusive territorial sub-licenses granted by it to others; and save and except said license to California Corrugated Culvert Co., the Plaintiff, Karl L. Lanninger, has been and now is the owner of all right, title and interest in and to said invention and said Letters Patent therefor, No. 1,747,942, throughout the United States of America and the territories thereof. Profert is hereby made of said United States Letters Patent, the original or a certified copy thereof being ready in Court to be produced as the Court may direct, and an uncertified printed copy thereof being hereto annexed as Exhibit "A", and to which reference is hereby made and by such reference being incorporated herein as though set forth in full and at length.

V.

That the Plaintiff, California Corrugated Culvert Co., and its sub-licensees, have manufactured and sold devices in accordance with said Letters Patent and the same have met with great commercial success; that Plaintiff, California Corrugated Culvert Co., has, prior to the commencement of this suit, given written notice to the Defendants herein of said Letters Patent and of the claim of infringement thereof. [4]

VI.

Upon information and belief Plaintiffs allege that within the six years last past, within the judicial district of this Court, since the granting of said Letters Patent, and prior to commencement

of this suit, and since the granting of the aforesaid license to the Plaintiff, California Corrugated Culvert Co., and without the license or consent of Plaintiffs, or either of them, the Defendants, jointly and severally, have manufactured and sold pipe joints embodying the invention illustrated, described and claimed in the aforesaid United States Letters Patent, and have thereby infringed and are now continuing to infringe upon the rights of Plaintiffs in, to and under said Letters Patent, and particularly Claim 3 thereof; and Plaintiffs are informed and believe and thereupon allege that Defendants threaten to continue and will continue to so infringe said Letters Patent unless enjoined by this Court.

VII.

That by reason of such infringement as aforesaid, Defendants have wrongfully gained profits which rightfully belong to Plaintiffs, and Plaintiffs have suffered damages, the exact amount of which profits or damages is unknown to Plaintiffs and can be ascertained only by an accounting.

VIII.

That for the wrongful acts of Defendants and a continuance thereof, Plaintiffs have no plain, adequate and complete remedy at law.

Wherefore, Plaintiffs pray for a Decree of this Court adjudging said Letters Patent in suit, No. 1,747,942, to be good and valid in law and to have been infringed by Defendants and each of them; that Plaintiffs have against Defendants, and each

of them, an Order for writ of preliminary injunction pendente lite and a permanent and perpetual injunction upon final hearing, against further infringement by Defendants, and each of them, and all [5] those in active concert and participation with them or either of them, and an accounting for profits wrongfully acquired by Defendants and the damages sustained by Plaintiffs, by means of such infringement, and that the award of said damages be trebled by reason of the wilful nature of the infringement; and that an assessment of costs of suit be made against Defendants and in favor of Plaintiffs, and for such further relief as may be equitable.

CALIFORNIA CORRUGATED
CULVERT CO.

KARL LANNINGER

By WM. S. GRAHAM
their Attorney

THEODORE J. GEISLER

302 Platt Building

Portland, Oregon

Attorney for Plaintiffs

WILLIAM S. GRAHAM

111 Sutter Street

San Francisco, California

Of Counsel for Plaintiffs

[Note: For Exhibit "A" to Complaint, see
Trial Exhibit No. 11.]

[Endorsed]: Filed April 3, 1941. [6]

And Afterwards, to wit, on the 23rd day of April, 1941, there was duly Filed in said Court, an Answer, in words and figures as follows, to wit: [10]

[Title of District Court and Cause.]

ANSWER

The Defendants, for answer to the complaint of the Plaintiffs:

I.

Admit the allegations in Paragraph I of the complaint as to the corporate identity and residence and place of business of the Plaintiff, California Corrugated Culvert Co.; but allege that they are without knowledge as to the citizenship or residence of the Plaintiff, Karl Lanninger, and therefore leave the Plaintiffs to proof as to the allegations in said paragraph contained concerning Karl Lanninger.

II.

Admit the allegations of Paragraph II of the complaint.

III.

Admit the allegations of Paragraph III of the complaint, excepting that the Defendants deny that they, or any of them, have committed any acts of infringement in the judicial district therein mentioned or elsewhere.

IV.

Admit that on February 18th, 1930, United States Letters Patent for Invention numbered 1,747,942 issued to the Plaintiff, Karl Lanninger, pursuant

to an application filed by said Karl Lanninger in the United States Patent Office on October 8th, 1923, Serial number 667,353; but deny that such Letters Patent issued in compliance with [11] law or duly or regularly issued; that the Plaintiff, Karl Lanninger, was the first inventor of the devices described in said Letters Patent, or any thereof. As to all remaining allegations in said paragraph contained, Defendants allege that they are without knowledge as to the truth or falsity thereof, and therefore deny the same.

V.

Allege that they are without knowledge as to the truth or falsity of the matters alleged in Paragraph V of the complaint, and therefore deny the same, excepting only that they admit that, prior to the commencement of this suit, Plaintiff, California Corrugated Culvert Co., has given written notice to the Defendants herein of the Letters Patent in said paragraph mentioned and of claim of infringement thereof.

VI.

Deny each and every allegation in Paragraph VI of the complaint contained.

VII.

Deny each and every allegation in Paragraph VII of the complaint contained, and specifically allege that they have gained no profits of any degree or nature rightfully belonging to the Plaintiffs, and that Plaintiffs have suffered no damages

of any degree or nature by reason of the acts of the Defendants.

VIII.

Deny each and every allegation set out in Paragraph VIII of the complaint.

IX.

Further answering said bill of complaint, the Defendants allege that there is no real invention or novelty in the patent numbered 1,747,942, in suit, and that the alleged "pipe joint", set forth in the claims of the patent, and all thereof, is not the statutory subject of invention and is not any new or useful art within the statutes in such case made and provided, and the said alleged method [12] or improvement or system or art is not patentable subject matter under said statutes.

X.

Further answering the complaint of the Plaintiffs, the Defendants allege that the said Letters Patent numbered 1,747,942, discloses no patentable invention over and in view of the state of the art at and prior to the time application for said patent was filed and as illustrated in the instances thereof referred to in Paragraph XI of this answer. The claims of the said patent numbered 1,747,942 purport to cover and cover a mere aggregation of elements; and Defendants assert that the state of the art before and at the time of the alleged invention and/or application for Letters Patent therefor was such that, to be valid, the

claims of said patent must be so narrowly construed as to be incapable of being validly applied to pipe joint construction. Defendants allege that, in view of the knowledge and practice of the art at and prior to the date of filing of the application for Letters Patent in the United States Patent Office upon the patent in suit, it required no invention whatsoever, but only the ordinary skill of the art to which said alleged invention of Letters Patent of the United States, numbered 1,747,942, appertains to make the same; and the said Letters Patent is consequently invalid and void.

XI.

Further answering the complaint of the Plaintiffs, the Defendants allege that the said Letters Patent in suit, numbered 1,747,942, is wholly void because the alleged inventions set forth in the claims of the patent, and each and all thereof, and every material and substantial part thereof, therein claimed as new, were invented by others prior to the alleged invention thereof by the Plaintiff, Karl Lanninger, and were shown and described in printed publications in the United States before the alleged invention by the patentee and for more than two years prior to the filing of the [13] application for patent on which said patent issued as follows:

UNITED STATES PATENTS

Number	Patentee	Date	
1,363,565	G. Christenson	December	28, 1920
222,195	T. J. McGowan	December	2, 1879
948,312	R. M. Dixon	February	8, 1910
999,169	T. N. Jones	July	25, 1911
557,296	R. Wigan	March	31, 1896
685,818	R. M. Close	November	1, 1901
1,009,303	C. C. Hansen	November	21, 1911
631,661	E. L. Perry, Jr.	August	22, 1899
580,084	H. H. Gorter	April	6, 1897
1,202,506	R. Galloway	October	24, 1916
628,018	J. Muskett	July	4, 1899

and others of which Defendants are not at present advised, but beg leave to add thereto by proper amendment of this, their answer, together with details thereof when such information is obtained.

XII.

Further answering the complaint of the Plaintiffs, the Defendants allege that, in view of the function, structure and purpose of the alleged invention, as illustrated, described and set out in the [14] Letters Patent in suit, these Plaintiffs cannot seek for nor obtain a construction of the claims of said patent, or any of them, sufficiently broad to cover or include within the purview thereof the construction employed by these Defendants, which is as set out in Paragraph XV of this answer.

XIII.

Further answering the complaint of the Plaintiffs, the Defendants allege that, by reason of the proceedings had or taken in the United States

Patent Office in the prosecution of the application for Letters Patent of the United States, in suit, numbered 1,747,942, the patentee therein named, his legal representatives and assigns, are estopped from maintaining the same in such scope as to cover or embrace any apparatus which the Defendants may have made, used or sold or which they are now making, using or selling.

XIV.

Further answering the complaint of the Plaintiffs, the Defendants allege that the aforesaid Letters Patent, in suit, numbered 1,747,942, was issued by the United States Patent Office without due investigation and that an important part of the relevant prior art, hereinbefore set forth, was overlooked and other parts of said prior art were improperly applied and construed, by reason whereof the Commissioner of Patents exceeded his legal authority in granting the aforesaid Letters Patent, and the said patent is therefore void and of no effect.

XV.

The construction made, used and/or sold by the Defendants herein and which the Defendants have been informed and believe is the subject matter of the Plaintiffs' complaint in this suit, consists of pipe couplers manufactured, used and/or sold under the claims of United States Letters Patent numbered 1,945,293, dated January 30th, 1934, issued to R. H. Pierce, as patentee, with various forms of locks used in connection therewith for

the purpose of holding [15] together the ends of two pipes connected by such couplers.

Wherefore, Defendants allege that Plaintiffs are entitled to no relief prayed for in the bill of complaint herein or to any relief, and pray to be hence dismissed with their costs in this cause sustained, and for such other and further relief as to the Court may seem just.

J. S. MIDDLETON

Attorney for Defendants

[Endorsed]: Filed April 23, 1941. [16]

And Afterwards, to wit, on the 14th day of July, 1941, there was duly Filed in said Court, a Stipulation to permit defendants to incorporate additional patents in their answer, in words and figures as follows, to wit: [17]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties hereto by their respective counsel of record, William S. Graham and Theodore J. Geisler, for the Plaintiffs, and J. S. Middleton, for the Defendants, as follows:

(1) The Defendants may incorporate in Paragraph XI of their answer herein, additionally to the patents therein cited, the following patents:

UNITED STATES PATENTS

Number	Patentee	Date	
1,619,439	W. T. Skillern	March	1, 1927
1,255,577	E. F. Berry	February	5, 1918
1,448,646	J. F. Ward	March	13, 1923
1,117,961	J. H. Phillips, Jr.	November	17, 1914
1,292,524	L. W. Serrell	January	28, 1919
811,812	E. V. Anderson	February	6, 1906
1,274,406	J. W. Frazier	August	6, 1918
1,130,726	L. W. Greve	March	9, 1915

and by order of the above entitled Court approving this stipulation, the answer may be taken and deemed to be so amended.

(2) That notice of the defenses pleaded in the answer herein and particularly, notice of the patents cited as prior art in Paragraphs X and XI of said answer (as amplified by the terms of this stipulation) need not be given by the defendants otherwise than by the terms of said answer as amplified by the terms of this [18] stipulation and the order to be entered hereon.

(3) That upon trial of this cause and upon the taking of any depositions preceding trial, either or both of the parties hereto may introduce in evidence, where admissible, plain printed copies of patents furnished by the United States Patent Office, without certification thereof, and that the dates of application shown by said copies shall be taken and deemed as the correct dates of filing of the applications therefor in the United States Patent Office.

Dated this 16th day of May, 1941.

T. J. GEISLER

Of Counsel for Plaintiffs

WM. S. GRAHAM

Of Counsel for Plaintiffs

J. S. MIDDLETON,

Counsel for Defendants.

[Endorsed]: Filed July 14, 1941. [19]

And Afterwards, to wit, on Monday, the 14th day of July, 1941, the same being the 7th Judicial day of the Regular July, 1941, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [20]

[Title of District Court and Cause.]

ORDER BASED ON STIPULATION

Based upon the stipulation of the parties hereto, the original whereof was filed with the Clerk of this Court at the time of commencement of pre-trial of this cause on July 14th, 1941, and which original stipulation in writing was, at the time of such pre-trial, broadened by oral stipulation of the parties hereto made in open court, to add to the last of patents therein cited, the following

UNITED STATES PATENTS

Number	Patentee	Date	
965,998	T. Evans	August	2, 1910
543,871	L. J. Houze	August	6, 1895

it is at this time

Ordered:

(1) The Defendants may incorporate in Paragraph XI of their answer herein, additionally to the patents therein cited, the following patents:

UNITED STATES PATENTS

Number	Patentee	Date	
1,619,439	W. T. Skillern	March	1, 1927
1,255,577	E. F. Berry	February	5, 1918
1,448,646	J. F. Ward	March	13, 1923
1,117,961	J. H. Phillips, Jr.	November	17, 1914
1,292,524	L. W. Serrell	January	28, 1919

[21]

811,812	E. V. Anderson	February	6, 1906
1,274,406	J. W. Frazier	August	6, 1918
1,130,726	L. W. Greve	March	9, 1915
965,998	T. Evans	August	2, 1910
543,871	L. J. Houze	August	6, 1895

and that such answer be and the same is hereby deemed and taken to be so amended without need for clerical entry therein of the patents above cited.

(2) That notice of the defenses pleaded in the answer of the Defendants, and particularly notice of the patents cited as prior art in Paragraphs X and XI of said answer (as amplified by the terms of this order) need not be given by the Defendants otherwise than by the terms of said answer as amplified by the terms of this order.

(3) That upon trial of this cause, either or both of the parties hereto may introduce in evidence where admissible, plain printed copies of patents furnished by the United States Patent Office without certification thereof, and that the

dates of application shown by said copies shall be taken and deemed as the correct dates of filing of the applications therefor in the United States Patent Office; and that any such plain printed copies of patents introduced in evidence by either of the parties hereto, upon depositions herein and prior to the entry of this order, shall likewise be received in evidence herein without certification.

Dated this 14th day of July, 1941.

JAMES ALGER FEE

Judge

[Endorsed]: Filed July 14, 1941. [22]

And Afterwards, to wit, on the 7th day of August, 1942, there was duly Filed in said Court, a Notice and Motion to add party plaintiff and to file supplemental complaint with vesting order of Alien property Custodian and affidavit of William S. Graham, in words and figures as follows, to wit:

[35]

[Title of District Court and Cause.]

MOTION AND NOTICE OF MOTION TO ADD
PARTY PLAINTIFF AND FILE SUPPLE-
MENT TO COMPLAINT.

To defendants above named and to J. S. Middleton, Esq., their attorney:

Please take notice that on Monday, the tenth day of August, 1942, at the hour of 10 o'clock A. M., or as soon thereafter as counsel may be heard, in

the courtroom of the above entitled Court, the plaintiffs will move the Court for an Order:—

1. granting plaintiffs leave to add as a party plaintiff in the above entitled cause, Leo T. Crowley, Alien Property Custodian of the United States.

2. granting leave to plaintiffs to file herein a Supplemental Complaint, copy of which is annexed hereto.

The grounds of this motion are that: [36]

(a) that at the time of commencement of this action, to-wit, on or about the 2nd day of April, 1941, and at all times hereafter up to and including the 17th day of June, 1942, the plaintiff Karl Lanninger was owner of the legal title and of all right, title and interest in the Letters Patent here in suit No. 1,747,942, except the license rights of plaintiff, California Corrugated Culvert Co., as set forth in paragraph IV of the Complaint herein; that subsequent to the commencement of this suit, to-wit, on the 18th day of June, 1942, the United States Alien Property Custodian, Leo T. Crowley, by Vesting Order Number 27, (copy of which is annexed hereto), directed that all right, title and interest in the said Letters Patent, and all accrued royalties and recoverable damages and profits, shall be and the same thereby were vested in the Alien Property Custodian of the United States; and that said Leo T. Crowley, United States Alien Property Custodian has been, ever since said 18th day of June, 1942, and now is, the owner of the legal title to said Letters Patent in suit, and all rights and interest therein and thereunder, save and ex-

cept the aforesaid license rights of the plaintiff, California Corrugated Culvert Co.; (b) that plaintiff, California Corrugated Culvert Co. and its attorneys were not aware of said Vesting Order Number 27, until the 31st day of July, 1942, when the same came to the attention of the attorney for the plaintiffs, William S. Graham, in a casual manner when said attorney inquired at the San Francisco Office of the Alien Property Custodian as to whether it would be necessary for him to secure a personal permit to represent an alien enemy in the trial of this cause.

That the Alien Property Custodian has consented to be made a party co-plaintiff.

In support of this motion, plaintiffs will read from and rely on the papers on file in this cause, the annexed affidavit of William S. Graham, Federal Rules of Civil Procedure 15 and 21, [37] copy of the Vesting Order number 27 referred to above, and the proposed Supplement to Complaint, copy of which is attached hereto.

THEODORE J. GEISLER

WM. S. GRAHAM

Attorneys for Plaintiffs

Received the copy of the foregoing motion and notice, including proposed Supplement to Complaint and Vesting Order number 27 of the Alien Property Custodian dated June 18, 1942, this 5th day of August, 1942.

J. S. MIDDLETON

Attorney for Defendants

[Title of District Court and Cause.]

SUPPLEMENT TO COMPLAINT

To the Honorable, the Judges of the above entitled Court:—

Come now the plaintiffs and by leave of Court file this Supplement to the Complaint heretofore filed in this action, and thereupon supplementally allege:

I.

That this is a civil action for an injunction and an accounting for infringement of United States Letters Patent No. 1,747,942, granted February 18, 1930, to Karl Lanninger for improvements in Pipe Line.

II.

That in the original complaint filed herein on or about April 2, 1941 the plaintiffs appear as California Corrugated [39] Culvert Co., a corporation, and Karl Lanninger.

III.

That the plaintiff, Leo T. Crowley, Alien Property Custodian, added as a co-plaintiff by this Supplement to the Complaint, is the duly appointed Alien Property Custodian of the United States, and, as such, duly and lawfully issued the Vesting Order number 27, herein after referred to.

IV.

That at the time of filing Complaint herein, and at all times up to and including June 17, 1942,

the plaintiff, Karl Lanninger, owned all title and interest in, to and under said United State Letters Patent number 1,747,942, save and except for that certain license alleged by Paragraph IV of said Complaint to have been granted to and owned by plaintiff, California Corrugated Culvert Co.

V.

That subsequent to the commencement of this action, to-wit, on the 18th day of June, 1942, Leo T. Crowley, Alien Property Custodian of the United States, issued pursuant to law a Vesting Order number 27, entitled "Vesting of Certain Patents," whereby said Alien Property Custodian directed that all rights, title and interest, in and to said United States Letters Patent here in suit No. 1,747,942, to Karl Lanninger, shall be and the same thereby were vested in the Alien Property Custodian of the United States, including all accrued royalties, and all damages and profits recoverable for past infringement thereof; and at all times since said 18th day of June, 1942, said Alien Property Custodian has been and now is owner of all right, title and interest in, to and under said Letters Patent, save and except the aforesaid license owned by plaintiff, California Corrugated Culvert Co.

THEO. J. GEISLER

WM. S. GRAHAM

Attorneys for Plaintiffs [40]

Title 8—Aliens and Nationality

Chapter II—Office of Alien Property Custodian

Part 502—Vesting Orders—Vesting Order No. 27

Vesting of Certain Patents

§ 502.27 Under the authority of Section 5 (b) of the Trading with the Enemy Act of October 6, 1917 (50 U. S. C. A. App. § 5 (b)), as amended by Sec. 301 of the First War Powers Act, 1941 (Pub. L. No. 354, 77th Cong., 1st Sess. (Dec. 18, 1941) § 301), and pursuant to Executive Order No. 9095 of March 11, 1942, the undersigned, finding upon investigation that the property hereinafter described is the property of Nationals of a Foreign Country designated in Executive Order 8389, as amended, as defined therein, and that the action herein taken is in the public interest, hereby directs that such property shall be and the same hereby is vested in the Alien Property Custodian to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States; such property being described as follows:

All right, title and interest, including all accrued royalties and all damages and profits recoverable at law or in equity from any person, firm, corporation or government for past infringement thereof, in the patents, the numbers of which are listed in Exhibits A, B, C, D, E, F, and G attached hereto and made a part hereof, and the titles to which stand of record

in the United States Patent Office in the names of the persons appearing (a) in the case of the aforesaid Exhibits A, B, C, D, E, and F, at the respective tops thereof, and (b) in the case of said Exhibit G, opposite the respective numbers listed therein.

Such property and any and all of the proceeds thereof shall be held in a special account pending further determination of the Alien Property Custodian. This shall not be deemed to limit the power of the Alien Property Custodian to return such property or the proceeds thereof, or to indicate that compensation will not be paid in lieu thereof, if and when it should be determined that such return or compensation should be made.

Any person not a national of a foreign country designated in Executive Order No. 8389, as amended, claiming any interest in any or all of such property and/or any person asserting any claim as a result of this order may file with the Alien Property Custodian a notice of his claim, together with a request for a hearing thereon, on Form APC-1 within one year from the date of this order, or within such further time as may be allowed by the Alien Property Custodian.

Executed at Washington, D. C., on June 18, 1942.

(Signed) LEO T. CROWLEY

Alien Property Custodian

(F. R. Doc. 42-5812; Filed, June 22, 1942; 10:48 a.m.)

(7 F. R. 4629 (Number 122, June 23, 1942.)) [41]

EXHIBIT G

Patents the title to which stand of record in the United States Patent Office in the names of the persons appearing opposite the numbers thereof, respectively, as follows:

	Number	Name
Reissue	1,747,942	Karl Lanninger
(and 40 others on Page 1) [42]		

AFFIDAVIT OF WILLIAM S. GRAHAM IN
SUPPORT OF MOTION TO ADD PARTY
PLAINTIFF

State of California,
City and County of San Francisco—ss.

William S. Graham, being first duly sworn, deposes and says that he is one of the attorneys of record for plaintiffs; that affiant is informed and believes that the plaintiff Karl Lanninger is a German National and resides in Germany; that at the time of commencement of this suit, the legal title to Letters Patent in suit No. 1,747,942 was owned by said Karl Lanninger; that said ownership by said Lanninger continued up to and including the 17th day of June, 1942; that subsequent to the commencement of this suit, to-wit, on the 18th day of June, 1942, the Alien Property Custodian of the United States took over all right, title and interest in and to said Letters Patent No. 1,747,942, by Vesting Order number 27, and at all times since said 18th day of June, 1942, said Alien Property Custodian has been and now is the owner of all right,

title and interest in, to and under said Letters Patent, save and except the license rights owned by plaintiff California Corrugated Culvert Co.; that neither affiant nor the plaintiff, California Corrugated Culvert Co. was aware of the Vesting Order number 27 of June 18, 1942, until the 31st day of July, 1942, when the matter casually came to the attention of affiant in connection with an inquiry on another matter at the San Francisco office of the Alien Property Custodian; that affiant immediately and on the same day, to-wit, July 31, 1942, telegraphed to the Alien Property Custodian at Washington, D. C., requesting authority to add said Alien Property Custodian in the place and stead of said Karl Lanninger, as owner of the legal title to said Letters Patent in suit, and on August 1st, 1942, the office of said Alien Property Custodian advised affiant by tele- [44] gram that the Alien Property Custodian consented to become a party co-plaintiff in this Action.

WILLIAM S. GRAHAM

Sworn to and subscribed before me this 5 day of Aug., 1942.

[Seal] CAROLYNE CLEMENTS
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires Nov. 20, 1943.

[Endorsed]: Filed August 7, 1942. [45]

And Afterwards, to wit, on Monday, the 10th day of August, 1942, the same being the 31st Judicial

day of the Regular July, 1942, Term of said Court; present the Honorable Leon R. Yankwich, United States District Judge for the Southern District of California, presiding, the following proceedings were had in said cause, to wit: [46]

[Title of District Court and Cause.]

ORDER SUBSTITUTING LEO T. CROWLEY
AS PARTY PLAINTIFF

It appearing to the court that the plaintiff Karl Lanninger, the owner of the legal title to the patent in suit subject to the exclusive license therein held by the party plaintiff California Corrugated Culvert Co., is an alien residing in Germany, and the U. S. Custodian of alien property, Leo T. Crowley, having lawfully taken possession of all the property rights and interest of the patent in suit, and the said custodian having appeared in this suit by the U. S. Attorney for Oregon and a motion having been made to substitute the said custodian of alien property in place of the plaintiff Karl Lanninger and such motion having been argued by counsel, in consideration thereof it is

Ordered that the said Leo T. Crowley, U. S. Custodian of alien property, be and he hereby is made a party plaintiff in the place and stead of the said Karl Lanninger in all further proceedings in this suit.

LEON R. YANKWICH

U. S. District Judge

Dated August 10th, 1942.

[Endorsed]: Filed August 10, 1942. [47]

And Afterwards, to wit, on the 19th day of August, 1942, there was duly Filed in said Court, a Stipulation relative to pre-trial Exhibits, in words and figures as follows, to wit: [48]

[Title of District Court and Cause.]

STIPULATION RE PRE-TRIAL EXHIBITS

It Is Stipulated and Agreed by and between the Plaintiffs, by William S. Graham, of their counsel, and the Defendants, by J. S. Middleton, their counsel, as follows:

1. Upon trial of this cause, plain printed copies of patents, without certification, may be offered as exhibits by both parties, subject to the rules of evidence, with the same force and effect as originals or certified copies, and that the dates of filing of applications, as shown by such copies, shall be taken as the dates of filing of the applications in the United States Patent Office.

2. As to pretrial Exhibits 13 and 14, copies may be admitted with the same force and effect as originals.

3. As to models of couplings, offered as physical exhibits, that the tubular members have additional pipe lengths connected thereto in use, except pre-trial Exhibit 53.

4. That pretrial Exhibit 56 is a catalogue to the trade of R. H. Pierce Manufacturing Co., of Eugene, Oregon, which business is conducted by R. H. Pierce, who is the same person as the R. H. Pierce

mentioned as manufacturer of the tubular coupler members of pretrial Exhibits 3, 8, 47 and 48.

WM. S. GRAHAM

Of Attorneys for Plaintiffs

J. S. MIDDLETON

Attorney for Defendants

[Endorsed]: Filed August 19, 1942. [49]

And Afterwards, to wit, on Wednesday, the 19th day of August, 1942, the same being the 39th Judicial day of the Regular July, 1942, Term of said Court; present the Honorable Leon R. Yankwich, United States District Judge for the Southern District of California, presiding, the following proceedings were had in said cause, to wit: [50]

[Title of District Court and Cause.]

ORDER UPON PRETRIAL

This matter came regularly on for hearing before the Court, the Honorable James Alger Fee presiding, on July 14, 1941, upon pretrial, the Plaintiffs appearing by Launcelot W. Hanson, of the Plaintiff, California Corrugated Culvert Co., and by Theodore J. Geisler and William S. Graham, their attorneys, and the Defendants appearing by Harry J. Wolf, one of their number, and by J. S. Middleton, their attorney.

The hearing was for the purpose of conducting pretrial of the cause.

The parties, through counsel, presented to the Court a brief statement of the nature of the proceedings and a general outline of the facts involved, and thereupon proceeded to definition of the issues and to offer in evidence their respective pre-trial exhibits; the pretrial procedure being at that time conducted from July 14, 1941, to July 16, 1941, inclusive. Thereupon, the pretrial hearing was adjourned for final completion immediately prior to actual trial, under the instruction of the Court.

Thereafter, and on August 15, 1942, pretrial procedure was resumed at an adjourned hearing thereof under the supervision of the [51] Honorable Leon R. Yankwich, but in the absence of the Court. The parties appeared, the Plaintiffs by Launcelot W. Hanson and by Theodore J. Geisler and L. R. Geisler, their attorneys, and the Defendants appeared by J. S. Middleton, their attorney.

The parties completed the offer in evidence of their respective pretrial exhibits not theretofore offered; and, pretrial procedure having been now completed, the Court, being now fully advised in the premises, finds and orders as follows:

1. This is a suit for an injunction and an accounting brought by the Plaintiffs herein and against the Defendants, based upon Claim 3 of United States Letters Patent numbered 1747942, entitled "Pipe Line," granted February 18, 1930, to Karl Lanninger, upon an application for such letters patent, filed in the United States Patent Office by the said Karl Lanninger on October 8, 1923, based upon an application previously filed in

Germany on October 14, 1922. The jurisdiction of this Court in this cause is founded upon laws of the United States relating to patents for inventions. Jurisdiction of the subject matter and of the parties is admitted.

2. The Plaintiffs charge the Defendants with infringement of said patent, and particularly Claim 3 thereof (the other claims not being charged as infringed), through the manufacture and sale within the District of Oregon and within the judicial district of this Court, within six years last past and since the granting of said letters patent and prior to the commencement of this suit and without the license or consent of the Plaintiffs, of devices embodying the characteristics of mechanical design and construction disclosed in said letters patent and claimed in Claim 3 of said United States Letters Patent numbered 1747942, above referred to.

3. The pipe joints, which are the subject matter of the Plaintiffs' claims of infringement, are those exemplified by pretrial Exhibits 47 and 48, and also by pretrial Exhibits 3 and 8.

4. The Defendants admit that, within the District of Oregon [52] and within the judicial district of this Court, and within six years last past and since the granting of the patent in suit and prior to the commencement of suit, they have sold devices of the kind exemplified by pretrial Exhibits 47 and 48 and 3 and 8, and that, as to devices sold by them having the characteristics of pretrial Exhibits 8 and 47, they have manufactured such devices to the extent of buying the tubular portions of the coupler

entities from Ralph H. Pierce, of Eugene, Oregon, the manufacturer thereof, and have themselves cut out the notch in the lip at the end of the tubular member of larger diameter and have welded on the hook or lock to the other tubular member; and that, as to devices having the characteristics of pretrial Exhibits 3 and 48, the Defendants have manufactured the same to the extent of buying the tubular portions of the coupler entities from Ralph H. Pierce, of Eugene, Oregon, the manufacturer thereof, and that they have purchased the latch-like locking means from the manufacturer thereof, R. L. Gheen, of Eugene, Oregon, and Defendants have themselves attached the said locking means to the body of the tubular portions of the couplings prior to sale by Defendants, with the understanding that in use and sale and "manufacture", as above defined, pipes and additional coupling members at the ends of pipes are installed at the ends of the models introduced as exhibits as here numbered.

5. The Defendants deny infringement through their proceedings as hereinbefore detailed.

6. The Defendants allege that the coupler entities responding to the characteristics of pretrial Exhibits 3, 8, 47 and 48 are manufactured and sold under and respond to the claims of United States Letters Patent numbered 1945293, for Pipe Joint, issued to Ralph H. Pierce, as patentee, under date of January 30, 1934, and with various forms of locks used in connection therewith for the purpose of holding together the ends of two pipes connected by such couplers; and Defendants contend that the

locking means attached to couplers responding to the characteristics of pretrial Exhibits 3 and 48 are manufactured and [53] sold under and respond to the claims of the United States Letters Patent numbered 2,253,232, issued August 19, 1941, to R. L. Gheen, of Eugene, Oregon, and that the locking means attached to couplers responding to the characteristics of pretrial Exhibits 8 and 47 are manufactured and sold under and respond to the claims of United States Letters Patent numbered 2,221,284, issued November 12, 1940, to W. R. Ames & Co., as assignee of R. A. Folsom. The Plaintiffs deny that the coupler entities and the locking means, exemplified by pretrial Exhibits 3, 8, 47 and 48, respond to the claims of the United States Letters Patent hereinbefore mentioned.

7. It is alleged by the Plaintiffs and admitted by the Defendants that the Plaintiff, California Corrugated Culvert Co., is a corporation organized and existing under and by virtue of the laws of the State of California; that the original Plaintiff, Karl Lanninger, is a citizen and subject of Germany and a resident of Frankfort-on-Maine in Germany; and that the Defendants, Sam Schnitzer, Harry J. Wolf, Rose Schnitzer and Jennie Wolf, are residents of Portland, in Multnomah County, Oregon, and are co-partners doing business under the name and style of Alaska Junk Co., with an established place of business in the City of Portland, Multnomah County, Oregon.

8. It is alleged by the Plaintiffs and admitted

by the Defendants that on February 18, 1930, United States Letters Patent numbered 1747942, issued to the original Plaintiff, Karl Lanninger, upon an application filed by the said Karl Lanninger in the United States Patent Office on October 8, 1923, serial number 667353; that the Plaintiff, California Corrugated Culvert Co., holds an exclusive license under such patent for irrigation purposes in and throughout the United States of America, to manufacture, sell and use the patented invention, the said admission by Defendant of validity of such license, however, being co-extensive only with the validity of the patent under which it is issued, such license being by virtue of an instrument dated August 14, 1937, a copy whereof is offered in evidence as pretrial [54] Exhibit 13; and it is further admitted by Defendants that the original Plaintiff, Karl Lanninger, was, until June 18, 1942, the owner of all right, title and interest in and to said invention and said letters patent therefor, numbered 1737942, throughout the United States of America and the territories thereof; that on June 18, 1942, Leo T. Crowley, Alien Property Custodian of the United States, did, by vesting order numbered 27, vest in the Alien Property Custodian of the United States, all right, title and interest of said Karl Lanninger in said letters patent, subject, however, to said successive titles being subject to said license of the Plaintiff, California Corrugated Culvert Co., and such admissions by Defendants being subject to determination of the validity of the

patent itself. Copy of such patent is offered in evidence as pretrial Exhibit 11.

9. Defendants allege that such Letters Patent numbered 1747942 never validly issued from the United States Patent Office, for the reasons:

(a) That the pipe joint set forth in the claims of the patent, and all thereof, is not the statutory subject of invention, and is not any new or useful article or combination within the statutes in such case made and provided, and the alleged article or combination is not patentable subject matter under such statutes;

(b) That the claims of said patent, and all thereof, purport to cover and cover a mere aggregation of elements;

(c) That, in view of the knowledge and practice of the art at and prior to the date of filing of the application for letters patent in the United States Patent Office for the patent in suit, it required no invention whatsoever but only the ordinary skill of the art to which said alleged invention appertains to make the same;

(d) That the alleged inventions set forth in the claims of the patent, and each thereof, and every material and substantial part thereof therein claimed as new, were invented by others prior to the alleged invention thereof by the Plaintiff, Karl Laninger, and were [55] shown and described in printed publications in the United States before the alleged invention by the patentee of the patent in suit and for more than two years prior to the filing of the application for patent in suit upon which

said patent in suit issued, said prior patents, publications and inventions having been duly and timely pleaded in Defendants' answer, as follows:

UNITED STATES PATENTS

Number	Patentee	Date
1,363,565	G. Christenson	December 28, 1920
222,195	T. J. McGowan	December 2, 1879
948,312	R. M. Dixon	February 8, 1910
999,169	T. N. Jones	July 25, 1911
557,296	R. Wigan	March 31, 1896
685,818	R. M. Close	November 5, 1901
1,009,303	C. C. Hansen	November 21, 1911
631,661	E. L. Perry, Jr.	August 22, 1899
580,084	H. H. Gorter	April 6, 1897
1,202,506	R. Galloway	October 24, 1916
628,018	J. Muskett	July 4, 1899
1,619,439	W. T. Skillern	March 1, 1927
1,255,577	E. F. Berry	February 5, 1918
1,448,646	J. F. Ward	March 13, 1923
1,117,961	J. H. Phillips, Jr.	November 17, 1914
1,292,524	L. W. Serrell	January 28, 1919
811,812	E. V. Anderson	February 6, 1906
1,274,406	J. W. Frazier	August 6, 1918
1,130,726	L. W. Greve	March 9, 1915
965,998	T. Evans	August 2, 1910
543,871	L. J. Houze	August 6, 1895

(e) That the letters patent in suit were issued by the United States Patent Office without due investigation, and that an important part of the relevant prior art hereinbefore set forth was overlooked and other parts of said prior art were improperly applied and construed, by reason whereof the Commissioner of Patents exceeded his legal authority in granting the aforesaid letters patent.

(f) Defendants further allege that the state of the art before and at the time of the alleged inven-

tion and/or application for letters patent resulting in such patent was such that, to be valid, the claims of said patent must be so narrowly construed as to be incapable of being validly applied to pipe joint construction; and for the further reason that, in view of the function, structure and purpose of the alleged invention, as illustrated, described and set out in the letters [56] patent in suit, the Plaintiffs cannot seek for nor obtain a construction of the claims of said patent, or any of them, sufficiently broad to cover or include within the purview thereof the construction employed by the Defendants, as hereinbefore set forth;

(g) By reason of the proceedings had and taken in the United States Patent Office in the prosecution of the application whereon ultimately issued the patent in suit, the patentee therein named, his legal representatives and assigns, are estopped from maintaining the same in such scope as to cover or embrace any apparatus which the Defendants may have made, used or sold, as hereinbefore set forth.

All of such affirmative allegations by the Defendants are denied by the Plaintiffs and stand at issue.

10. The Plaintiffs allege that the invention purported to be covered by the terms of the patent in suit is an improvement in pipe line; and the Defendants deny such allegation on the part of the Plaintiffs, and allege that the purported improvement applies to a pipe joint only. These matters remain at issue.

11. It is alleged by the Plaintiffs and admitted by the Defendants that, subsequent to the grant of

the letters patent in suit and prior to the commencement of this suit, the Plaintiff, California Corrugated Culvert Co., has given written notice to the Defendants of said letters patent (see pretrial Exhibit 90) and of the said Plaintiff's claims of infringement thereof, and that the manufacture and sale of devices having the characteristics of Exhibits 3, 8, 47 and 48 have been continued by Defendants for irrigation purposes subsequent to said notice, as such manufacture is defined in Paragraph 4 hereof.

12. The Plaintiffs allege that the Plaintiff, California Corrugated Culvert Co., and its sublicensees, have manufactured and sold devices in accordance with the letters patent in suit, and that the same have met with great commercial success; and these allegations the Defendants deny; and such allegations and denials stand at issue. [57]

13. The Plaintiffs allege their right to an accounting for damages and/or profits by reason of the infringement charged against the Defendants, and pray for trebling of damages because of wilful infringement; and further allege their right to an injunction against continued infringement; Plaintiffs also pray for costs of suit; and the Defendants deny the right of the Plaintiffs to either an accounting of any nature, or to treble damages, or to an injunction, and deny that Plaintiffs are entitled to costs of suit, and seek costs of suit and further relief; and such matters stand at issue to abide the decree of this Court.

14. The questions of fact remaining for determination by the Court are:

a. Is Claim 3 of the letters patent in suit valid?

b. Do the devices sold by the Defendants and manufactured by them within the meaning of the "manufacture", as defined in Paragraph 4 of this order, which devices are exemplified by pretrial Exhibits 47 and 48 and 3 and 8, come within the terms of Claim 3 of the patent in suit with sufficient exactitude to constitute infringements thereof?

c. Does the patent in suit cover improvement in pipe line or in pipe joint, or either? If so, is the invention novel and useful?

d. Has the Plaintiff, California Corrugated Culvert Co., and its sublicensees, manufactured and sold devices in accordance with Claim 3 of the letters patent in suit?

e. Have such devices, if the Court finds affirmatively upon the next preceding issue, met with great commercial success?

f. Is the alleged "pipe joint", set forth in the claim 3 of the patent in suit, the statutory subject of invention, and is the same any new or useful art within the statutes in such case made and provided, and does the same constitute patentable subject matter under such statutes?

g. Does Claim 3 of the patent in suit disclose patentable [58] invention over and in view of the state of the prior art at and prior to the time application for said patent was filed?

h. Does Claim 3 of the patent in suit purport to

cover, and cover, a mere aggregation of elements in view of such state of the prior art, or does the said Claim 3 constitute a validly patentable combination?

i. Is Claim 3 of the patent in suit, in view of the state of the prior art, to be so narrowly construed as to be incapable of being validly applied to pipe joint construction, or is it to be liberally construed for a meritorious invention and entitled to a commensurate range of equivalents?

j. In the light of such prior art, would it require invention or only the ordinary skill of the art to which the alleged invention of the patent in suit appertains to make the same?

k. Was the invention set forth in Claim 3 of the patent in suit, and the material and substance thereof, therein claimed as new, invented by others prior to the alleged invention thereof by the Plaintiff, Karl Lanninger; and, if so, were such alleged inventions shown and described in printed publications in the United States before the alleged invention by the said patentee and more than two years prior to the filing of the application for patent upon which the patent in suit issued?

l. In view of the function, structure and purpose of the alleged invention, as illustrated, described and set out in the claims of the letters patent in suit, can the Plaintiffs seek for or obtain a construction of Claim 3 of said patent sufficiently broad to cover or include within the purview thereof the construction employed by the Defendants, as such construction is exemplified by Exhibits 3, 8, 47 and

48, and as those exhibits are defined in Paragraph 4 of this order?

m. Was the patent in suit issued by the United States Patent Office without due investigation; and was an important part of [59] relevant prior art overlooked; and were other parts of such prior art improperly applied and construed in the proceedings in the Patent Office leading up to issue of the patent in suit?

15. Remaining to be determined by the Court, as conclusions of law, are:

a. Have the defenses of invalidity been proved by the Defendants to a degree sufficient to overcome the legal presumption of validity of Claim 3 of the patent in suit?

b. Is said Claim 3 of the patent in suit valid?

c. Is said Claim 3 entitled to a broad or narrow construction?

d. Have Plaintiffs proved infringement by preponderance of evidence?

e. Have the Defendants infringed Claim 3 of the patent in suit?

f. Are the Plaintiffs entitled to an accounting against Defendants ;and, if so, are the Plaintiffs entitled to treble damages?

g. Are the Plaintiffs entitled to a preliminary or permanent injunction through order or decree of this Court?

h. To whom shall costs of suit be awarded by decree?

16. Commencing on the following page is a com-

plete list of the pretrial exhibits offered by the respective parties, with a brief designation of the nature of each exhibit: [60]

LIST OF EXHIBITS

Exhibit

- 1—(Defs'.) Copy of Lanninger Patent, No. 1,749,942.
- 2—(Defs'.) Model of coupler similar to those made by Plaintiff, California Corrugated Culvert Company.
- 2A—(Defs'.) Portion of model (constituting Defendants' Exhibit 2) to which links are hinged.
- 3—(Defs'.) Model of couple claimed by Plaintiffs to infringe Lanninger Patent.
- 3A—(Defs'.) Section of model, (constituting Exhibit 3) having a larger diameter end, and corresponding to Pierce coupler.
- 3B—(Defs'.) Section of model, (constituting Exhibit 3) having a smaller diameter end.
- 4—(Defs'.) Sample of packing similar to packing in Exhibit 3A.
- 5—(Defs'.) Model of coupler.
- 6—(Defs'.) Elastic packing for coupler of model comprising Exhibit 5.
- 7—(Defs'.) Model of coupler.
- 7A—(Defs'.) One part of body of couple of Defendants' Exhibit 7.
- 7B—(Defs'.) Another part of the body of coupler of Defendants' Exhibit 7.

List of Exhibits—(Continued)

Exhibit

- 7C—(Defs'.) Another part of the body of coupler of Defendants' Exhibit 7.
- 8—(Defs'.) Model of device claimed by Plaintiffs to infringe Lanninger Patent.
- 8A—(Defs'.) Larger end of device of Exhibit 8.
- 8B—(Defs'.) Smaller end of device of Exhibit 8.
- 9—(Defs'.) Model of coupler.
- 9A—(Defs'.) Part of model of Defendant's Exhibit 9.
- 9B—(Defs'.) Part of model of Defendants' Exhibit 9.
- 9C—(Defs'.) Part of model of Defendants' Exhibit 9.
- 10—(Defs'.) Model of coupler.
- 10A—(Defs'.) Larger end of model (Defendants' Exhibit 10).
- 10B—(Defs'.) Smaller end of model (Defendants' Exhibit 10).
- (All above Exhibits introduced in deposition taken on behalf of Defendants.) [61]
- 11—(Plffs'.) Copy of Lanninger Patent, No. 1,747,942, constituting a patent in suit. (Note: copy of this patent previously introduced as Defendants' Exhibit 1).
- 12—(Plffs'.) Certificate of Title to Lanninger Patent.
- 13—(Plffs'.) Copy of license granted under Lanninger Patent to California Corrugated Culvert Company.

List of Exhibits—(Continued)

Exhibit

- 14—(Plffs'.) Copy of authorization from Lanninger authorizing California Corrugated Culvert Company to file and prosecute patent suits.
- 15—(Plffs'.) Letter from Karl Lanninger, dated March 14, 1941 at Frankfort, Germany, to show that he was a resident of Germany.
- 16—(Plffs'.) Compilation of Sidney W. Klahn, dated July 15, 1941, pertaining to devices manufactured by Oregon Culvert Pipe Company.
- 17—(Plffs'.) Pipe coupling claimed to be manufactured by Plaintiffs under the Lanninger Patent.
- 18—(Plffs'.) Sketch illustrating one construction and method of operation of Lanninger patent.
- 19—(Plffs'.) Sketch illustrating construction and operation of coupler of Plaintiffs' Exhibit 17.
- 20—(Plffs'.) Sketch illustrating construction and method of operation of couple comprising Defendants' Exhibit 3.
- 21—(Plffs'.) Sketch illustrating construction and method of operation of coupler comprising Defendants' Exhibit 8.
- 22—(Defs'.) Copy of United States Patent No. 1,945,293, issued January 30, 1934 to R. H. Pierce.

List of Exhibits—(Continued)

Exhibit

- 23—(Defs'.) Copy of United States Patent No. 2,221,284, issued November 12, 1940 to Rolfe A. Folsom.
- 24—(Defs'.) Copy of United States Patent No. 1,363,565, issued December 28, 1920 to G. Christenson.
- 24A—(Defs'.) Enlargement of drawing of patent of Exhibit 24.
- 25—(Defs'.) Copy of United States Patent No. 222,195 issued December 2, 1879 to T. J. McGowan.
- 25A—(Defs'.) Enlargement of drawing of Patent of Exhibit 25.
- 26—(Defs'.) Copy of United States Patent No. 948,312, issued February 8, 1910 to R. M. Dixon. [62]
- 27—(Defs'.) Copy of United States Patent No. 999,169, issued July 25, 1911 to T. N. Jones.
- 28—(Defs'.) Copy of United States Patent No. 557,296, issued March 31, 1896 to R. Wigan.
- 28A—(Defs'.) Enlargement of drawing of drawing of patent of Exhibit 28.
- 29—(Defs'.) Copy of United States Patent No. 685,818, issued November 5, 1901 to R. M. Close.
- 29A—(Defs'.) Enlargement of patent drawing of patent of Exhibit 29.
- 30—(Defs'.) Copy of Patent No. 1,009,303, issued November 21, 1911 to C. C. Hansen.

List of Exhibits—(Continued)

Exhibit

- 30A—(Defs'.) Enlargement of drawing of patent of Exhibit 30.
- 31—(Defs'.) United States Patent No. 631,661, issued August 22, 1899 to E. L. Perry, Jr.
- 32—(Defs'.) Copy of Patent No. 580,084, issued April 6, 1897 to H. H. Gorter.
- 32A—(Defs'.) Enlargement of drawing of Patent of Exhibit 32.
- 33—(Defs'.) Copy of Patent No. 1,202,506, issued October 24, 1916 to R. Galloway.
- 33A—(Defs'.) Enlargement of drawing of Patent of Exhibit 33.
- 34—(Defs'.) Copy of Patent No. 628,018, issued July 4, 1899 to J. Muskett.
- 34A—(Defs'.) Enlargement of patent drawing of Patent of Exhibit 34.
- 35—(Defs'.) Copy of Patent No. 1,619,439 issued March 1, 1927 to W. T. Skillern.
- 36—(Defs'.) Copy of Patent No. 1,255,577, issued February 5, 1918 to E. F. Berry.
- 37—(Defs'.) Copy of Patent No. 1,448,646, issued March 13, 1923 to J. F. Ward.
- 38—(Defs'.) Copy of Patent No. 1,117,961 issued November 17, 1914, to J. H. Phillips, Jr.
- 38A—(Defs'.) Enlargement drawing of Patent of Exhibit 38.
- 39—(Defs'.) Copy of Patent No. 1,292,524, issued January 28, 1919 to L. W. Serrell.
- 40—(Defs'.) Copy of Patent No. 811,812, issued February 6, 1906 to E. V. Anderson. [63]

List of Exhibits—(Continued)

Exhibit

- 41—(Defs'.) Copy of Patent No. 1,274,406, issued August 6, 1918 to J. W. Frazier and F. E. Hansen.
- 41A—(Defs'.) Enlargement of drawing of patent of Exhibit 41.
- 42—(Defs'.) Copy of Patent No. 1,130,726, issued March 9, 1915 to L. W. Greve.
- 42A—(Defs'.) Enlargement of drawing of patent of Exhibit 42.
- 43—(Defs'.) Copy of Patent No. 965,998, issued August 2, 1910 to T. Evans.
- 44—(Defs'.) Copy of Patent No. 543,871, issued August 6, 1895 to L. J. Houze.
- 45—(Defs'.) Certified copy of File Wrapper of Lanninger Patent, No. 1,747,942.
- 46A—(Defs'.)) Photostat sheets and bulletins
46B—(Defs'.)) showing illustrations of gas-
46C—(Defs'.)) kets alleged to have been
46D—(Defs'.)) put out by E. F. Houghton
46E—(Defs'.)) & Company.
46F—(Defs'.))
- 47—(Defs'.) Model of coupler alleged to conform to Pierce Patent No. 1,945,293.
- 47A—(Defs'.) " " " (male part)
47B—(Defs'.) " " " (female part).
- 48—(Defs'.) Model of coupling made in accordance with the specification of Pierce Patent No. 1,945,293.
- 48A—(Defs'.) " " " (male end).
48B—(Defs'.) " " " (female end).

List of Exhibits—(Continued)

Exhibit

- 48C—(Defs'.) " " " (hook swinging as
a lock to connect the two members).
- 49—(Defs'.) Model of pipe coupling claimed to
be constructed according to Lanninger patent.
- 49A—(Defs'.) " " " (male end).
- 49B—(Defs'.) " " " (female end). [64]
- 50—(Defs'.) Model of coupling alleged to be
constructed according to specifications of
Lanninger Patent.
- 50A—(Defs'.) " " " (male end).
- 50B—(Defs'.) " " " (female end).
- 50C—(Defs'.) " " " (the band about
the male end).
- 51—(Defs'.) Model of pipe coupler alleged to
be made according to the specifications of
the Lanninger Patent.
- 51A—(Defs'.) " " " (male end).
- 51B—(Defs'.) " " " (female end).
- 51C—(Defs'.) " " " (ring about the
center of the device).
- 52—(Defs'.) Model of coupler alleged to be con-
structed according to specifications of Patent
No. 999,169 to T. N. Jones (Defendants' Ex-
hibit 27).
- 52A—(Defs'.) " " " (male portion).
- 52B—(Defs'.) " " " (female portion).
- 52C—(Defs'.) " " " (center portion).
- 53—(Defs'.) Model of coupler alleged to be
made in accordance with specifications of
Patent No. 1,292,524 of Serrell (Defendants'
Exhibit No. 39).

List of Exhibits—(Continued)

Exhibit

- 53A—(Defs'.) " " " (male end).
53B—(Defs'.) " " " (female end).
53C—(Defs'.) " " " (central portion).
54—(Defs'.) Model of coupler alleged to be constructed as composed of specifications of Lanninger Patent, Jones Patent (No. 999,169) and Serrell Patent (No. 1,292,524).
54A—(Defs'.) " " " (male end).
54B—(Defs'.) " " " (female end).
54C—(Defs'.) " " " (central ring).
55—(Defs'.) Model of female end of Pierce Patent, No. 1,945,293.
56—(Plffs'.) Catalog issued by R. H. Pierce Manufacturing Co., Eugene, Oregon, having on front cover picture of coupling and notation thereunder [65] "patented January 30, 1934, Patent No. 1,945,293."
57—(Plffs'.) Orders of Oregon Culvert Pipe Co. for pipe sold.
58—(Plffs'.) Deposition of Lancelot W. Hanson taken on behalf of Defendants.
59—(Plffs'.) Drawings of model (Plaintiffs' Exhibit 17).
60—(Plffs'.) Drawings of model (Defendants' Exhibit 47).
61—(Plffs'.) Drawings of model (Defendants' Exhibit 48).
62—(Plffs'.) Drawings of model (Defendants' Exhibit 49).

List of Exhibits—(Continued)

Exhibit

- 63—(Plffs'.) Drawings of model (Defendants' Exhibit 50).
- 64—(Plffs'.) Drawings of model (Defendants' Exhibit 51).
- 65—(Plffs'.) Drawings of model (Defendants' Exhibit 52).
- 66—(Plffs'.) Drawings of model (Defendants' Exhibit 53).
- 67—(Plffs'.) Drawings of model (Defendants' Exhibit 54).
- 67—(Plffs'.) Drawings of model (Defendants' Exhibit 55).
- 69—(Plffs'.) Drawings, on one sheet, of Lanninger structure and of Defendants' Exhibit 47 and 48, and claim 3 claimed applied.
- 70—(Plffs'.) Model of Figure 1 of Lanninger Patent No. 1,747,942.
- 71—(Plffs'.) Three photographs of installation in Oregon of pipe line with the couplers manufactured by Plaintiffs.
- 72—(Plffs'.) Four photographs of installation in Oregon of pipe line with couplers manufactured by Plaintiffs.
- 73—(Plffs'.) One photograph of installation in Oregon of pipe line with couplers manufactured by Plaintiffs.
- 74—(Plffs'.) Three photographs of pipes with couplers manufactured by Plaintiffs and sold in Oregon.

List of Exhibits—(Continued)

Exhibit

- 75—(Plffs'.) Two photographs of pipe lines installed in Oregon with couplers similar to Defendants Exhibits 3 and 48.
- 76—(Plffs'.) Two photographs of pipe line with couplers installed in Oregon, the couplers being similar to Defendants' Exhibit 8, 47, 3 and 48. [66]
- 77—(Plffs'.) Compilation by L. W. Hanson from records of Plaintiff, California Corrugated Culvert Co., of sales of couplers by said company to Oregon Culvert & Pipe Co. of Portland, Oregon, and claimed by Plaintiffs to be within Claim 3 of Lanninger patent in suit.
- 78—(Plffs'.) Copy of letter dated January 2nd, 1942, California Corrugated Culvert Co. to Alien Property Custodian, Washington, D. C.
- 79—(Plffs'.) Copy of letter dated January 6, 1942, The Bank of The Manhattan Company, New York, to California Corrugated Culvert Company.
- 80—(Plffs'.) Certified copy of Vesting Order No. 27, Office of Alien Property Custodian.
- 81A—(Def's'.) A model (consisting of two parts, marked 81-A and 81-B, respectively), having cut from it a 45-degree section, which model, it is claimed by the defendants, responds to the characteristics of the patented structure disclosed in U. S. Letters Patent No. 1,945,293 issued to Ralph H. Pierce.

List of Exhibits—(Continued)

Exhibit

- 82A—(Defs'.) A model (consisting of three parts, marked 82-A, 82-B and 82-C, respectively) of pipe coupling, with inserted pipe ends, which it is claimed responds to structure shown in U. S. Letters Patent No. 1,945,293, issued to Ralph H. Pierce, etc.
- 83—(Defs'.) Printed copy of United States Letters Patent No. 2,253,232, issued August 19, 1941, to R. L. Gheen.
- 84—(Defs'.) Certified copy of complaint, stipulation for dismissal and order of dismissal in California Corrugated Culvert Co., a corporation, Plaintiff, v. R. H. Pierce, Defendant, Civil No. 234, in District Court of United States for District of Oregon.
- 85A—(Defs'.) Letter, November 12th, 1930, California Corrugated Culvert Co., H. M. Chadwick, to R. H. Pierce.
- 85B Letter, August 4, 1931, H. M. Chadwick to Ralph H. Pierce.
- 85C Letter, November 17, 1932, California Corrugated Culvert Co., L. W. Hanson, Asst. Engr., to R. H. Pierce.
- 85D Letter, June 20, 1933, H. M. Chadwick to Ralph H. Pierce.
- 85E Letter, August 21, 1933, H. M. Chadwick to Ralph H. Pierce. [67]
- 85F—(Defs'.) Letter, September 25, 1933, H. M. Chadwick to R. H. Pierce.

List of Exhibits—(Continued)

Exhibit

- 85G Letter, October 13, 1933, California Corrugated Culvert Co., L. W. Hanson, Asst. Engr., to R. H. Pierce.
- 85H Letter, January 5, 1934, California Corrugated Culvert Co., L. W. Hanson, Asst. Engr., to Ralph H. Pierce.
- 85I Copy of letter, September 30, 1937, W. H. Pierce Manufacturing Co., R. H. Pierce, to H. M. Chadwick.
- 85J Letter, October 4, 1937, California Corrugated Culvert Co., H. M. Chadwick, to Ralph H. Pierce.
- 85K Copy of letter, October 8, 1937, R. H. Pierce Manufacturing Co., R. H. Pierce, to H. M. Chadwick.
- 85L Letter, October 12, 1937, H. M. Chadwick to R. H. Pierce.
- 85M Copy of letter, October 14, 1937, R. H. Pierce Manufacturing Co. to H. M. Chadwick.
- 85N Letter marked "Personal", addressed "Dear Ralph" and signed "H. M. C."
- 85O Letter, October 20, 1937, H. M. Chadwick to R. H. Pierce.
- 85P Copy of letter, October 22, 1937, R. H. Pierce to California Corrugated Culvert Co.
- 85Q Letter headed "Personal", addressed "Dear Ralph" and signed "Chad."

List of Exhibits—(Continued)

Exhibit

- 85R Letter, consisting of two pages, October 25, 1937, California Corrugated Culvert Co., H. M. Chadwick, to R. H. Pierce.
- 85S Copy of letter, October 27, 1937, R. H. Pierce Manufacturing Co., R. H. Pierce, to California Corrugated Culvert Co.
- 85T Copy of letter, October 29, 1937, R. H. Pierce to California Corrugated Culvert Co.
- 85U Letter, November 2, 1937, California Corrugated Culvert Company, H. M. Chadwick, to Ralph Pierce.
- 85V Letter, November 9, 1937, California Corrugated Culvert Co., H. M. C., to Ralph Pierce. [68]
- 85W—(Defs'.) Copy of letter, November 12, 1937, H. M. Pierce Manufacturing Co., H. M. Pierce, to California Corrugated Culvert Co.
- 85X Letter, November 16, 1937, California Corrugated Culvert Company, H. M. Chadwick, to R. H. Pierce.
- 85Y Copy of letter, November 22, 1937, R. H. Pierce Manufacturing Co., R. H. Pierce, to California Corrugated Culvert Co.
- 85Z Letter, January 31, 1938, H. M. Chadwick to R. H. Pierce.
- 86—(Defs'.) Agreement, dated December 22nd, 1937, between California Corrugated Culvert Co., etc., and R. H. Pierce.

List of Exhibits—(Continued)

Exhibit

- 87—(Defs'.) Office file wrapper of George F. McDougall.
- 87A Seven typewritten sheets in the back of Exhibit 87, headed "Specification".
- 87B Photostatic copy of Figures I, II, and III, bearing legend "Inventor Ralph H. Pierce by G. F. McDougall, Attorney".
- 87C Photostatic copy headed "A. D. 1894. Oct. 17. No. 19,776. Schmahl's Complete Specification", and on the side "(This drawing is a reproduction of the original on a reduced scale)".
- 87D A carbon copy consisting of two sheets addressed G. F. McDougall and signed in typewriting "Examiner", bearing a stamp "Mailed Dec. 30, 1937".
- 87E A carbon copy of letter dated January 18, 1938, Ralph H. Pierce By..... Attorney of Record to Commissioner of Patents.
- 87F A carbon copy of letter dated August 23, 1938, Ralph H. Pierce By Attorney of Record, to Commissioner of Patents.
- 87G Carbon copy of letter, consisting of two pages, bearing stamp "Mailed Mar. 4, 1938," Examiner to G. F. McDougall.
- 87H Printed copy of document headed "United States Patent Office. William T. Rice, of Berlin, Oklahoma Territory. Fishhook, No. 828,505", etc.

List of Exhibits—(Continued)

Exhibit

- 87I Letter, September 27, 1937, G. F. McDougall to Ralph Pierce.
- 87J Letter, January 7th, 1938, California Corrugated Culvert Co., L. W. Wyman, Vice Pres. & Chief Engr., to George F. McDougall. [69]
- 87K—(Defs'.) Letter, January 12, 1938, R. H. Pierce Manufacturing Co., R. H. Pierce, to George F. McDougall.
- 87L A sheet containing carbon copy of unsigned letter dated January 13, 1938, to Ralph H. Pierce, and letter dated Eugene, Oregon, Jan. 1938, addressed to G. F. McDougall and bearing at the bottom "Signed....., Inventor."
- 87M Letter dated Jan. 1938, R. H. Pierce, Inventor, to Mr. G. F. McDougall.
- 87N Leaflet headed "The Pierce Self-Sealing Pipe Coupler for Portable Irrigation Systems."
- 87O Leaflet headed "The Pierce Self-Sealing Pipe Coupler.
- 88—(Defs'.) Copy of letter dated January 11, 1938, addressed to Ralph H. Pierce, and unsigned.
- 88A Three sheets containing typed form of patent claims numbered 6 to 12, both inclusive.
- 89—(Defs'') Pamphlet headed "Portable Spire-weld Pipe," etc.

List of Exhibits—(Continued)

Exhibit

- 90—(Defs'.) Letter, November 30, 1940, Wm. S. Graham to Alaska Junk Company.
- 91—(Defs'.) Sheaf of purchase orders of Oregon Culvert & Pipe Co., including purchase orders of Pure Iron Culvert & Manufacturing Co.
- 92—(Defs'.) Sheaf of purchase orders of California Corrugated Culvert Company addressed to R. H. Pierce Manufacturing Company, etc.
- 93A—(Defs'.) Three sheets, the first two bearing the heading "1938 totals of various types Couplers Bought", and the third sheet being headed "Statement showing all purchases during 1939."
- 94—(Defs'.) Photostatic copy of pages 1103 and 1104 of Knights American Mechanical Dictionary, consisting of two sheets (to be supplied).
- 95—(Defs'.) Photostatic copy of page 1259, consisting of one sheet, of Knights American Mechanical Dictionary (to be supplied).
- 96—(Defs'.) Photostatic copy of page 876 of Knights American Mechanical Dictionary, consisting of one sheet (to be supplied).
- 97—(Defs'.) Order forms of Chicago Belting Company.
- 98—(Defs'.) Catalog of The Garlock Packing Company.
- 99—(Defs'.) Order form of The Garlock Packing Company. [70]

List of Exhibits—(Continued)

Exhibit

- 100—(Defs'.) Catalog of The Anchor Packing Company.
- 101—(Defs'.) Catalog of Belmont Packings.
- 102—(Defs'.) Catalog 20 of General Rubber & Supply Co.
- 103—(Defs'.) Catalog of Johns-Manville Packings.
- 104—(Defs'.) Catalog of Leather Packings issued by Alexander Brothers.
- 105—(Defs'.) Book bearing legend on cover "Water and Gas Works Appliances and Pumping Machinery. R. D. Wood & Co., Philadelphia."
- 106—(Plffs'.) Photostatic copy of letter dated July 12, 1939, R. H. Pierce Manufacturing Co. by R. H. Pierce, to California Corrugated Culvert Company, to be supplied.

17. Where the foregoing list of exhibits makes use of the word "allege" in describing any exhibit or exhibit, it will be understood that the word "alleged", so used, should be construed to mean "claimed". Unless specifically excepted to hereinafter, the origin of any particular exhibit, the authenticity of any letter and/or writing, the fact that the same was mailed and received and delivered, and that any date or dates shown are correct, and that any exhibit is what it purports to be, will be conceded by both parties.

18. The following pretrial exhibits are offered by the respective parties without objection by the other party. Where exhibit numbers are referred to, they shall be understood to include all sub-numbers:

1, 2, 4, 6, 11, 12, 13, 14, 15, 18, 19, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 38, 39, 40, 41, 42, 43, 44, 45, 56, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 70, 79, 80, 90, 91, 93, 94, 95, 96 and 106.

19. The following exhibits (including all sub-numbers thereof) are objected to by the parties on the ground that the same are irrelevant and immaterial:

22, 23, 71, 82, 83, 84, 86, 89, 92, 97, 98, 99, 100, 101, 102, 103 and 104.

20. The following exhibits (including all sub-numbers thereof) are objected to by the respective parties on the ground that the same are not pursuant to the patents which they purport to represent:

3, 5, 7, 8, 9, 10, 17, 47, 48, 49, 50, 51, 52, 53 and 55.

21. Pretrial Exhibit 16 is objected to by the Defendants as being not the original record. No objection is interposed to its use as a memorandum, but objection is made to its probative value.

22. Pretrial Exhibits 20 and 21 are objected to by the Defendants as being distorted drawings not correctly illustrating the subject matter.

23. Pretrial Exhibits 35 and 37 are objected to by the [72] Plaintiffs as not being prior patents and as not being in the prior art.

24. Pretrial Exhibits 46a to 46f, inclusive, are

offered by the Defendants only for the purpose of disclosing the time of disclosure and the character as shown by drawings and cuts and the trade names of certain gaskets or packings delineated. The Plaintiffs concede the dates of origin of the exhibits and the sources of origin to be as disclosed by the exhibits, but object to the introduction as having probative force of any descriptive matter in the exhibits.

25. Pretrial Exhibit 54, and sub-numbers a, b and c, is objected to by the Plaintiffs as being a hypothetical structure not pursuant to any one of the three patents named in the description of the exhibit.

26. The following numbered exhibits, including any sub-numbers thereof, are objected to by the opposing parties as being incompetent, irrelevant and immaterial:

57, 71, 72, 73, 74, 75, 76, 87, 88 and 105.

27. Pretrial Exhibit 58 is objected to by the Defendants only if, under the rules of Court, it shall prove inadmissible for any reason by reason of the attendance on the trial of the deponent.

28. Pretrial Exhibit 69 is objected to by the Defendants only as to the attempted application of the drawings and reference numbers thereon made.

29. Pretrial Exhibit 77 is objected to by the Defendants as incompetent, irrelevant and immaterial for any purpose other than as a memorandum, but is not objected to if used as a memorandum of aid to the testimony of a witness.

30. Pretrial Exhibit 78 is objected to by the Defendants as containing self-serving declarations.

31. Pretrial Exhibit 81 is objected to by the Plaintiffs on the ground that it is irrelevant and immaterial, and does not conform to the Pierce patent, and is fragmentary. [73]

32. Pretrial Exhibit 85 is objected to by the Plaintiffs on the ground that it is irrelevant and immaterial, but authenticity of the correspondence is conceded, but the authority of the parties, Chadwick or Hanson to bind the corporate Plaintiff, California Corrugated Culvert Co., is denied.

Entered this 19th day of August, 1942.

LEON R. YANKWICH

Judge

[Endorsed]: Filed August 19, 1942. [74]

And Afterwards, to wit, on the 1st day of September, 1942, there was duly Filed in said Court, an Opinion, in words and figures as follows, to wit:

[75]

[Title of District Court and Cause.]

DECISION

Appearances:

Theodore J. Geisler

L. R. Geisler

Platt Building, Portland, Oregon

William S. Graham

111 Sutter Street

San Francisco, California

James H. Hazlett,
for Alien Property Custodian
Assistant United States Attorney
Portland, Oregon
Attorneys for Plaintiffs

J. S. Middleton
1035 Pacific Building
Portland, Oregon
Attorneys for Defendants

Yankwich, District Judge:

The above entitled cause, heretofore tried and submitted, is hereby determined as follows:

Decree ordered for the plaintiff, as prayed.

The court is of the view that the patent is valid. While the elements of the combination are old, the combination achieves a result not heretofore attained or anticipated in the art. The best references are far afield from the patented device.

I am also of the view that the defendants' device infringes. [76]

Some of the experts for the defendants sought to find two or three deviations in the accused device. The stress, on the argument, however, was laid on one departure only: the "V" or "U" shape packing.

It is true that the inventor throughout speaks of a flange packing. It may also be conceded that the meaning of the two kinds of packing (flange, or "V" or "U" shape) is well established in the trade.

However, that does not determine the matter. To avoid infringement, the new element must achieve

a different function or a different or better result. This is not the case here.

The element in the accused devices, while different in shape, performs the same function, in the same manner.

Hence the finding that the patented device is valid and that the defendants have infringed Claim 3 of Letters Patent 1,747,942, Lanninger.

The interlocutory decree is to provide for injunction to issue against the defendants, enjoining infringement, manufacture, or sale, and reference to Irving Rand, Esquire, Special Master, to take an accounting and ascertain the damages to be awarded to plaintiffs.

Dated September 1, 1942.

LEON R. YANKWICH

District Judge.

[Endorsed]: Filed September 1, 1942. [77]

And Afterwards, to wit, on the 8th day of September, 1942, there was duly Filed in said Court, Exceptions by defendant to proposed findings, in words and figures as follows, to wit: [78]

[Title of District Court and Cause.]

EXCEPTIONS TO PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW

The Defendants at this time except to the proposed findings of fact and conclusions of law served

upon their counsel on September 5, 1942, in the following particulars:

I.

The Defendants except generally to all of such findings, which are to the effect that the letters patent in suit legally issued to Karl Lanninger.

II.

The Defendants except generally to all of such findings, which are to the effect that the patent in suit has been infringed.

III.

The Defendants except specifically to the findings incorporated in Paragraph VII, to the effect that the several elements of combination of Claim 3 of the patent in suit are not found in a similar operative relation in a prior device or publication, and to the effect that the prior art does not disclose the inventive concept, for the reason that, under the ruling of the Court during the trial, the Defendants were precluded from introducing in evidence the prior art in the field of flexible joints for hose lines; and, generally, as to the [79] remaining findings in said paragraph incorporated, the same are not supported by the proof.

IV.

The Defendants further except to such findings of validity of patent and infringement thereof, for the reason that, under the rulings of the Court during the trial, the Defendants were precluded from introducing offered proof to the effect that

the Plaintiff, California Corrugated Culvert Co., a corporation, has so construed Claim 3 of the patent in suit and its applicable effect, and the Defendants have so acted upon such construction, that Plaintiff, California Corrugated Culvert Co., is now estopped to assert the scope of Claim 3 of the patent in suit to include the structures which are found to be infringing structures under the general effect of the findings.

V.

Additionally to the specific reasons for exception hereinbefore and in Paragraphs III and IV set forth, the Defendants base all of their exceptions, herein set forth, upon the proposition that the findings in these exceptions referred to are not supported by the proof.

Respectfully submitted,
(Signed) J. S. MIDDLETON
Attorney for Defendants

Exceptions overruled. L.R.Y.

[Endorsed]: Filed September 8, 1942. [80]

And Afterwards, to wit, on Wednesday, the 9th day of September, 1942, the same being the 56th Judicial day of the Regular July, 1942, Term of said Court; present the Honorable Leon R. Yankwich, United States District Judge for the Southern District of California, presiding, the following proceedings were had in said cause, to wit: [81]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause having come on to be heard before the Court, and having been brought to final hearing on the merits upon pleading and pretrial order, and proof and evidence, oral and documentary, adduced by both parties; and counsel for the respective parties having orally argued the cause, and the same having been fully considered by the Court, and the Court having heretofore made its order for judgment in favor of the plaintiffs herein; now, in accordance with the pleadings, the pretrial order, and the proof presented, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

That the plaintiff, California Corrugated Culvert Co., is a corporation, organized and existing under and by virtue of the laws of the State of California, and has a regular and established place of business in the City of Berkeley, County of Alameda, [82] State of California; that the plaintiff, Leo T. Crowley, is the Alien Property Custodian of the United States, and was, by order of this Court, subsequent to filing of the complaint herein, substituted as a party plaintiff in the place and stead of the original plaintiff, Karl Lanninger, a German National, residing in Germany.

II.

That the defendants Sam Schnitzer, Harry J. Wolf, Rose Schnitzer and Jennie Wolf, are inhabitants and residents of the City of Portland, County of Multnomah, State of Oregon, and have an established place of business in said City, County and State, and are doing business thereat as a co-partnership under the name and style of Alaska Junk Co., all within the jurisdiction of this Court.

III.

That the complaint in this cause was filed on or about the 2nd day of April, 1941, charging defendants with infringement of United States Letters Patent numbered 1,747,942, for Pipe Line, granted February 18, 1930 to Karl Lanninger, and praying for an injunction and an accounting, the said Lanninger being shown by said Letters Patent to be a German National; that the said Lanninger was an original plaintiff at the time of the filing of the complaint herein.

IV.

That the said original plaintiff, Karl Lanninger, was the sole inventor of the invention described in and claimed by the United States Letters Patent, here in suit, numbered 1,747,942, for Pipe Line, and that, at all times since the grant of said Letters Patent on the 18th day of February, 1930, and until the [83] 18th day of June, 1942, the said Karl Lanninger was the owner of all right, title and interest in, to and under said Let-

ters Patent, save and except that said Karl Lanninger, did, prior to the commencement of this suit, to-wit, on the 14th day of August, 1937, grant to plaintiff, California Corrugated Culvert Co., an exclusive license right under said Letters Patent throughout the United States and the territories thereof, to manufacture and sell devices covered by said Letters Patent for irrigation purposes, and, ever since said last mentioned date, said license has been and now is in force and effect. That on the 18th day of June, 1942, the said Karl Lanninger being then an Alien Enemy due to the Declaration of War between the United States and Germany, the Alien Property Custodian of the United States, Leo T. Crowley, did by Vesting Order Number 27 vest in the Alien Property Custodian of the United States all right, title and interest in, to and under said Letters Patent together with all accrued royalties and all rights of action for infringement and accountings for damages and profits arising therefrom.

V.

That the invention disclosed and described in said Letters Patent and covered by Claim 3 thereof, (which is the only Claim in suit), comprises a pipe joint in connection with pipes, the joints having a rigid sleeve member provided with an internal annular groove, and having an elastic packing member within the rigid sleeve, one portion of the packing member being a radially extended portion called

a flange which is held by friction in the annular groove of the sleeve, while another portion of the packing member is free to frictionally enclose and move with an unthreaded pipe end inserted thereinto through an open end of the sleeve, whereby a flexible hinged relationship of the pipe and rigid sleeve is provided, and whereby a water seal is provided at both the [84] groove and circumferentially of the end portion of the inserted unthreaded pipe, such sealing capacity being increased by introduction of hydraulic pressure of fluid in the pipe line, and means for hingedly securing the sleeve on the unthreaded pipe end and yet maintain the hinged relationship of the sleeve and unthreaded pipe, and prevent the joint from blowing out under the hydraulic pressure in the pipe line.

VI.

That a new and useful combination is provided by said Letters Patent and Claim 3 thereof, in that the elements cooperate to provide a new and useful result. The combination of the elements of Claim 3 is in providing a flexible joint of elements relatively releasably held in assembled operative relation and readily disassembled, and mechanically providing flexibility in the joints instead of having a joint of flexible material. The rigidity of the sleeve permits an annular groove to be made therein, which receives and holds the flange of the packing member, and supports it perpendicular to the axis of the sleeve, so that no matter whether the free cylindrical portion of the

packing member is deformed by movement of the inserted pipe end, the water seal of the flange in the groove is undisturbed. The packing flange also cooperates with the rigid sleeve and the unthreaded pipe end by furnishing resilient support circumferentially for the unthreaded pipe which is inserted therethrough. The free cylindrical portion of the packing member seals against leakage around the circumference of the unthreaded pipe end which is resiliently supported by the flange portion, thus providing hinged movement, while preserving the water seals. The means for hingedly securing the sleeve of the unthreaded pipe end cooperates to relatively secure the sleeve on the unthreaded pipe end in a manner to preserve the flexibility of the mounting of the unthreaded pipe end in the sleeve, and also prevents the joint from pulling apart under hydraulic pressure necessary to raise water over irregular ground, for showering or overhead irrigation, and [85] also when it is desired to adjust the alignment of the pipe line without disconnecting its parts.

VII.

The several elements of the combination of Claim 3 are individually old, but are not found in a similar operative relation in any prior device or publication; nor does the prior art disclose the inventive concept or achieve the same result of a flexible joint for pipe lines wherein a string of pipes may have relatively hinged relationship by means of an elastic packing sealing member

mounted within a rigid sleeve, wherein the packing member has a radially extended portion held in a sleeve groove and a free portion frictionally enclosing and sealing against an unthreaded pipe end within the sleeve, together with means for releasably securing the sleeve and unthreaded pipe end relatively so as to maintain the flexibility of the joint. Claim 3 of the patent in suit is not anticipated; the best prior art references are far afield from the patented device; nor is there an estoppel of the patent owner by the file wrapper requiring a limitation of Claim 3 more narrowly than the plain import of its terms.

VIII.

The evidence in this suit has primarily been based on the novelty and utility of the invention for overhead or shower irrigation of uneven and unlevelled ground. Prior to the invention of Laninger, overhead or shower irrigation had been carried on by permanent installations or systems of pipes with mechanically fixed non-flexible joints, the showering range of which is limited to approximately twenty feet on each side of the pipe line, such systems requiring for practical purposes the permanent installation of lines of pipe spaced approximately forty feet apart and each [86] line the length of the irrigated field. With the Laninger invention of the flexible joint, the sealing packing member, and readily releasable securing means, such lines of pipe were made portable and

a single line of pipe may be employed and made portable from one position to another of a field, the flexibility of the joint adapting the line to accommodate itself to irregularities of the ground in various irrigation rows and to be curved to follow contour.

IX.

That the plaintiff, California Corrugated Culvert Co., has manufactured and sold devices made in accordance with said Letters Patent numbered 1,747,942, and Claim 3 thereof, and said devices have met acceptance with the trade and public.

X.

That said United States Letters Patent numbered 1,747,942, here in suit are good and valid in law, and particularly as to Claim 3 thereof, (which was the only Claim relied upon by plaintiffs in this suit), and is entitled to liberal construction as a meritorious invention.

XI.

That prior to the commencement of this action, plaintiff, California Corrugated Culvert Co., gave written notice to defendant of the Letters Patent here in suit and of the claim of infringement thereof.

XII.

That subsequent to the grant of said Letters Patent and within the six years immediately preceding the filing of this action, and within the jurisdiction of this Court, and both prior and [87]

subsequent to the aforesaid notice, the defendants, Sam Schnitzer, Harry J. Wolf, Rose Schnitzer and Jennie Wolf, individually, and as a co-partnership doing business under the name and style of Alaska Junk Co., have, and each of them has, infringed upon said United States Letters Patent, and particularly upon Claim 3 thereof, without the license or consent of plaintiff, by manufacturing and selling, within the jurisdiction of this Court, devices described in and claimed by said Letters Patent numbered 1,747,942, and particularly Claim 3 thereof; and more particularly said defendants have manufactured and sold devices of the kind exemplified by Exhibits 47 and 48 in evidence in this cause, the devices of said Exhibits each comprising a pipe joint in connection with pipe in which there is a rigid sleeve having an internal annular groove, and an elastic packing member mounted in said sleeve for receiving therethrough and flexibly mounting an unthreaded pipe end, the packing member having a radially extended rim portion frictionally held in said annular groove and functioning for the purposes of maintaining the packing member in the sleeve and effecting a seal at the groove, the said packing member having a free cylindrical portion for frictionally enclosing the unthreaded pipe end inserted therein through an open end of the rigid sleeve; that in each of said devices there is means for hingedly securing the sleeve on the unthreaded pipe end, to-wit, in the device of Exhibit 47 there is a cut-out or notched

portion in the outward lip at a free end of the rigid sleeve and the unthreaded pipe end has a hook welded on the exterior thereof which is adapted to slide through said cut-out notch and by relative axial rotation of the sleeve and unthreaded pipe, the hook engages rearwardly of the outward end lip of the sleeve with a pivotal point of engagement affording hinged movement; and in the device of Exhibit 48, there is a latch and keeper lug mounted, respectively, on the respective sleeve and unthreaded pipe end which cooperates with the hinged relation of the sleeve and unthreaded pipe [88] to hingedly secure them relatively; and said packing members and said respective securing means operate in the same way to accomplish the same result by operation of substantially the same mechanical forces as the respective packing member and securing means of the Lanninger patent, and are the equivalent thereof. It was stipulated by the parties in the pretrial Order (Paragraphs 4 and 11) that manufacture and sale by defendants has been for irrigation purposes and that, in operation of defendants' devices, each of the pipe sections has a sleeve at one end and has the opposite end thereof unthreaded, and in a pipe line, the unthreaded pipe end is inserted in the sleeve of the next adjoining pipe section.

CONCLUSIONS OF LAW

And from the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

I.

That the ground for the jurisdiction of this Court in this cause is that said cause is a suit in equity for an injunction and an accounting arising under the laws of the United States relating to patents for inventions, the defendants being inhabitants and residents within the judicial district of this Court, and having an established place of business and having committed acts of infringement within said judicial district.

II.

That the Letters Patent here in suit, numbered 1,747,942, granted February 18, 1930, to Karl Laninger, entitled Pipe Line are good and valid in law and particularly as to Claim 3 thereof.

III.

That the plaintiff, The Alien Property Custodian of the [89] United States, Leo T. Crowley, is the owner of all right, title and interest in, to and under said Letters Patent numbered 1,747,942, save and except that the plaintiff, California Corrugated Culvert Co., has an exclusive license thereunder for irrigation purposes.

IV.

That the defendants, Sam Schnitzer, Harry J. Wolf, Rose Schnitzer and Jennie Wolf, individually, and as a co-partnership doing business under the name and style of Alaska Junk Co., have, and each of them has, infringed said Letters Patent,

and particularly Claim 3 thereof, and upon the rights of plaintiffs therein and thereunder.

V.

That the plaintiffs are entitled to a permanent and perpetual injunction against the said defendants, Sam Schnitzer, Harry J. Wolf, Rose Schnitzer and Jennie Wolf, and those in active concert and participation with them or either of them, enjoining and restraining them, and each of them, from directly or indirectly further infringing upon said Letters Patent, or the rights of Plaintiffs therein and thereunder.

That the plaintiffs are entitled to an accounting and a recovery from the defendants, for profits made by defendants by reason of infringement, or the damages suffered by plaintiffs therefrom, and to that end the Court will refer to a special master the matter of taking an accounting and reporting same to the Court, the Court also reserving until the Report of Such Special Master the determination of increase of damages pursuant to law. [90]

VII.

That the plaintiffs are entitled to recover their costs of suit.

VIII.

That the plaintiffs are entitled to a decree in accordance with the foregoing Findings of Fact and Conclusions of Law.

The foregoing Findings of Fact and Conclusions

of Law are approved this 9th day of September, 1942.

LEON R. YANKWICH

United States District Judge

[Endorsed]: Filed September 9, 1942. [91]

And Afterwards, to wit, on Wednesday, the 9th day of September, 1942, the same being the 56th Judicial day of the Regular July, 1942, Term of said Court; present the Honorable Leon R. Yankwich, United States District Judge for the Southern District of California, presiding, the following proceedings were had in said cause, to wit: [92]

In the United States District Court
for the District of Oregon

Civil Action No. 706

CALIFORNIA CORRUGATED CULVERT
COMPANY, a corporation, and LEO T.
CROWLEY, Alien Property Custodian of the
United States,

Plaintiffs,

vs.

SAM SCHNITZER, HARRY J. WOLF, ROSE
SCHNITZER, and JENNIE WOLF, individ-
ually, and as a co-partnership doing business
under the name and style of Alaska Junk
Company,

Defendants.

INTERLOCUTORY DECREE

This cause came on to be heard at this term, upon the pleading, pretrial Order and proofs of both parties, and upon oral argument by counsel; and thereupon, upon consideration thereof, it was Ordered, Adjudged, and Decreed, as follows:

I.

That the Letters Patent herein suit numbered 1,747,942, granted February 18, 1930, to Karl Laninger, entitled Pipe Line, and particularly Claim 3 thereof, disclosed patentable invention, are not anticipated in the prior art, and are good and valid in law.

II.

That the plaintiff, Alien Property Custodian of the United States, Leo T. Crowley, is the owner of all right, title and interest in and to said Letters Patent numbered 1,747,942, save and except that plaintiff, California Corrugated Culvert Co., [93] has been granted an exclusive license under said Letters Patent throughout the United States and its territories for irrigation purposes, which license is in force and effect.

III.

That the defendants, Sam Schnitzer, Harry J. Wolf, Rose Schnitzer and Jennie Wolf, individually, and as a co-partnership doing business under the name and style of Alaska Junk Co., have, and each of them has, infringed upon Claim 3 of said Letters Patent numbered 1,747,942 and have violated the exclusive rights of the plaintiffs thereunder, by making and selling pipe joint devices in connection with pipe embodying and containing the invention of said Letters Patent as set forth in Claim 3 thereof, the said infringing devices, made and sold by the defendants, being more particularly shown by Exhibits 47 and 48 filed in this cause.

IV.

That a Writ of Injunction issue out of and under the seal of this Court directed to the defendants, Sam Schnitzer, Harry J. Wolf, Rose Schnitzer and Jennie Wolf, perpetually enjoining and restraining the said defendants, and each of them,

their, and each of their associates, attorneys, clerks, servants, agents, workmen, employees, and those in active participation with them, from directly or indirectly making, using and/or selling, and/or causing to be manufactured, used and/or sold, Pipe Joints in connection with pipe heretofore manufactured and/or sold by the defendants, as exemplified by Exhibits 47 and 48 in this cause, or any other devices containing or embodying the invention of the Claims of said Letters Patent, and particularly Claim 3 thereof, and/or from in any wise infringing said Letters Patent and/or contributing to the infringement of said Letters Patent by others. [94]

V.

That the plaintiffs recover from the defendants, the profits, gains and advantages which the said defendants, or either of them, have received, or which may have accrued to them by reason of said infringement of said Claim 3 of said Letters Patent in suit, or the damages suffered by plaintiffs by reason of such infringement.

VI.

That this cause be referred to Irving Rand, Esq., Special Master, who is hereby appointed to ascertain, take, state and report to the Court an account of the infringing devices manufactured and/or sold by said defendants, which embody the invention of said Claim 3 of said Letters Patent numbered 1,747,942, and also the profits, gains and advantages which the defendant has received, or which

have been accrued to it, by reason of its infringement of said Letters Patent, and the damages which the plaintiffs have suffered by reason of said infringement; and the plaintiffs on said accounting shall have the right to cause the examination of the defendants, their agents, and employees, and also to examine other witnesses and to cause the production and examination of the books, vouchers, records and documents of said defendants, and to have all necessary process of the Court to compel such attendance and production before the said Special Master, at such times and places as said Special Master shall, from time to time, direct.

VII.

That the plaintiffs, recover from said defendants the taxable costs of the plaintiffs in this Court and that the Plaintiffs shall have judgment and execution against the said defendants for said costs.

(Signed) LEON R. YANKWICH

United States District Judge

Dated this 9th day of September, 1942.

[Endorsed]: Filed September 9, 1942. [95]

And Afterwards, to wit, on the 1st day of October, 1942, there was duly Filed in said Court,

a Notice of Appeal in words and figures as follows, to wit: [96]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To California Corrugated Culvert Company, a corporation; and

To Leo T. Crowley, Alien Property Custodian of the United States; Plaintiffs above named; and

To William S. Graham; and

To Theodore J. Geisler; and

To L. R. Geisler; Attorneys of record for the Plaintiff, California Corrugated Culvert Company, a corporation; and

To Carl C. Donough, United States District Attorney for the District of Oregon; and

To James H. Hazlett, his deputy; Attorneys of record for the Plaintiff, Leo T. Crowley, Alien Property Custodian of the United States:

You, and Each of You, Are Hereby Notified that Sam Schnitzer, Harry J. Wolf, Rose Schnitzer and Jennie Wolf, individually, and as a co-partnership doing business under the name and style of Alaska Junk Company, the Defendants above named, hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from that certain decree made and entered in the above entitled suit by the Honorable Leon R. Yankwich, sitting as one of the Judges of the above entitled Court, on the 9th day of September, 1942; and the Defendants above named hereby appeal as afore-

said from each and every matter determined by such decree.

SAM SCHNITZER,
HARRY J. WOLF,
ROSE SCHNITZER and
JENNIE WOLF,

Individually and as a co-partnership doing business under the name and style of the Alaska Junk Company.

By J. S. MIDDLETON,
1035 Pacific Building, Portland, Oregon, Attorney for Defendants. [97]

State of Oregon,
County of Multnomah—ss.

Service of the within Notice of Appeal is hereby accepted in Multnomah County, Oregon this 1st day of October, 1942, by receiving a copy thereof, duly certified to as such by J. S. Middleton, Attorney for Defendants.

THEODORE J. GEISLER,
By: B. DOUGLAS,
Sec'y.

Attorney for Plaintiff, California Corrugated Culvert Company, a corporation.

State of Oregon,
County of Multnomah—ss.

Service of the within Notice of Appeal is hereby accepted in Multnomah County, Oregon, this 1st day of October, 1942, by receiving a copy thereof,

duly certified to as such by J. S. Middleton, Attorney for Defendants.

CARL C. DONAUGH,
 JAMES H. HAZLETT,
 Attorneys for Plaintiff, Leo T. Crowley, Alien
 Property Custodian of the United States.

[Endorsed]: Filed October 1, 1942. [98]

And Afterwards, to wit, on the 1st day of October, 1942, there was duly Filed in said Court, a Bond on Appeal, in words and figures as follows, to wit: [99]

National Surety Corporation
 New York
 Vincent Cullen
 President

[Title of District Court and Cause.]

UNDERTAKING FOR PAYMENT OF
 COSTS ON APPEAL

Whereas, Sam Schnitzer, Harry J. Wolf, Rose Schnitzer and Jennie Wolf, defendants in the above entitled Court and cause, appeal to the Circuit Court of Appeals from that certain judgment heretofore, to wit, on September 9, 1942, rendered and entered in the above entitled Court and cause in favor of the plaintiffs and against the defendants.

Now, Therefore, in consideration of the premises and of such appeal, we Sam Schnitzer, Harry J.

Wolf, Rose Schnitzer, and Jennie Wolf, as Principals, and National Surety Corporation, a corporation organized and existing under the laws of the State of New York, and duly authorized to transact a surety business in the State of Oregon, as Surety, do hereby jointly and severally undertake and promise on the part of the said defendants and appellants, the said Sam Schnitzer, Harry J. Wolf, Rose Schnitzer, and Jennie Wolf, that said appellants will pay all damages, costs and disbursements which may be awarded against them on said appeal, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00).

In Witness Whereof the said Principals have caused these presents to be signed and executed, and the said Surety has caused these presents to be duly executed by its authorized Attorney-in-Fact, and its corporate seal to be hereunto affixed this 1st day of October, 1942.

S. SCHNITZER,
ROSE SCHNITZER,
H. J. WOLF,
JENNIE WOLF,
[Seal] NATIONAL SURETY CORPORATION,

By W. B. GILHAM,
Attorney-in-Fact.

Countersigned

By BURNETT GOODWIN,
Resident Agent.

[Endorsed]: Filed October 1, 1942. [100]

And Afterwards, to wit, on the 27th day of October, 1942, there was duly Filed in said Court, a Motion for extension of time to file record on appeal, in words and figures as follows, to wit: [101]

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME TO
FILE RECORD ON APPEAL

Come now the Defendants-Appellants, Sam Schnitzer, Harry J. Wolf, Rose Schnitzer, and Jennie Wolf, individually, and as a co-partnership doing business under the name and style of Alaska Junk Company, by J. S. Middleton, their attorney of record, and move the Court for an order extending the time within which the record of appeal shall be filed with the Circuit Court of Appeals for the Ninth Circuit to and including the 28th day of December, 1942, upon the ground and for the reason that the said record on appeal is necessarily voluminous, and that it will require said extension of time for the preparation of the transcript of the proceedings in the Trial Court and the proper preparation of the said record on appeal.

Dated this 27th day of October, 1942.

(Signed)

J. S. MIDDLETON,

Attorney for Defendants-Appellants.

[Endorsed]: Filed October 27, 1942. [102]

And Afterwards, to wit, on Tuesday, the 27th day of October, 1942, the same being the 97th Judicial day of the Regular July, 1942, Term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [103]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD ON APPEAL

This matter coming on for hearing upon the motion of Sam Schnitzer, Harry J. Wolf, Rose Schnitzer, and Jennie Wolf, individually, as as a co-partnership doing business under the name and style of Alaska Junk Company, Defendants-Appellants in the above entitled suit, for an order extending the time within which to file the record on appeal in the above entitled Court; and

It Appearing to the Court that notice of appeal was given and filed by the Defendants-Appellants on October 1, 1942, and that the record on said appeal is voluminous, and that it will reasonably require an extension of said time to and including December 28, 1942, within which to prepare and file said record on appeal; and the Court being advised in the premises and finding said motion well taken, it is hereby

Ordered and Adjudged that the Defendant-Appellants be and they are hereby granted to and including the 28th day of December, 1942, within which to prepare and have filed with the United

States Circuit Court of Appeals for the Ninth Circuit the record on appeal in said suit.

Done in open Court this 27th day of October, 1942.

(Signed) CLAUDE McCOLLOCH,
 District Judge.

[Endorsed]: Filed October 27, 1942. [104]

And Afterwards, to wit, on the 10th day of December, 1942, there was duly Filed in said Court, Appellants' Statement of Points on Appeal in words and figures as follows, to wit: [105]

[Title of District Court and Cause.]

APPELLANTS' STATEMENT OF POINTS
ON APPEAL

Come now Sam Schnitzer, Harry J. Wolf, Rose Schnitzer and Jennie Wolf, individually and as a co-partnership doing business under the name and style of Alaska Junk Co., Defendants and Appellants herein, and make of record this their designation of the points upon which they intend to rely upon appeal herein as follows:

1. The trial court erred in declining to consider proof and offered proof of anticipation of the patent in suit through prior development of analogous arts, including specifically that of coupling hoses.
2. The trial court erred in holding the patent in suit, and particularly Claim 3 thereof, valid.

3. The trial court erred in finding that the Plaintiffs were not estopped, by reason of the proceedings had and taken in the Patent Office in the prosecution of the application for the letters patent in suit, from maintaining such letters patent, and particularly Claim 3 thereof, in such scope as to cover or embrace the apparatus made, used and sold by the Defendants.

4. The trial court erred in failing to find that, by reason of the construction placed by them upon the scope and extent of the claims of the patent in suit, and particularly Claim 3 thereof, the [106] Plaintiffs were estopped to assert such claims, and particularly Claim 3 thereof, in scope wide enough to hold the Defendants guilty of infringement.

5. The trial court erred in finding and decreeing that the Defendants infringed Claim 3 of the patent in suit.

Respectfully submitted,

(Signed)

J. S. MIDDLETON,

Attorney for Defendants and
Appellants.

[Endorsed]: Filed December 10, 1942. [107]

And Afterwards, to wit, on the 10th day of December, 1942, there was duly Filed in said Court, Appellants' designation of contents of record on appeal in words and figures as follows, to wit: [108]

[Title of District Court and Cause.]

APPELLANTS' DESIGNATION OF
CONTENTS OF RECORD ON APPEAL

Come now the Defendants, Sam Schnitzer, Harry J. Wolf, Rose Schnitzer and Jennie Wolf, individually and as a co-partnership doing business under the name and style of Alaska Junk Co., and make and file this their designation of the following portions of the record, proceedings and evidence to be contained in the record on appeal, to-wit:

	Filing Date	Document
1.	April 3, 1941	Complaint.
2.	April 23, 1941	Answer.
3.	July 14, 1941	Stipulation.
4.	July 14, 1941	Order based on stipulation.
5.	September 6, 1941	Motion of Ralph H. Pierce for authorization to intervene.
6.	December 23, 1941	Order denying motion of Ralph H. Pierce.
7.	August 7, 1942	Motion for order adding party plaintiff and permitting the filing of a supplemental complaint.

	Filing Date	Document
8.	August 10, 1942	Order authorizing substitution of party plaintiff and filing of supplemental complaint.
9.	August 19, 1942	Stipulation relative to pretrial exhibits. [109]
10.	August 19, 1942	Pretrial order.
11.	August 26, 1942	All exhibits on file, including both documentary and physical exhibits.
12.	September 1, 1942	Opinion of the Court.
13.	September 8, 1942	Exceptions to proposed findings of fact and conclusions of law.
14.	September 9, 1942	Findings of fact and conclusions of law.
15.	September 9, 1942	Interlocutory decree.
16.	October 1, 1942	Notice of appeal.
17.	October 1, 1942	Bond on appeal.
18.	October 27, 1942	Motion for extension of time to file record on appeal.
19.	October 27, 1942	Order extending time to file record on appeal.
20.	December 8, 1942	Transcript of testimony (copy).

	Filing Date	Document
21.	December , 1942	Order directing transmittal of original exhibits.
22.	December , 1942	Appellants' statement of points on appeal.
23.	December , 1942	Appellants' designation of contents of record on appeal.

Respectfully submitted,
 (Signed) J. S. MIDDLETON,
 Attorney for Defendants and
 Appellants.

[Endorsed]: Filed December 10, 1942. [110]

And Afterwards, to wit, on Thursday, the 10th day of December, 1942, the same being the 36th Judicial day of the Regular November, 1942, Term of said Court; before the Honorable Leon R. Yankwich, United States District Judge for the Southern District of California, the following proceedings were had in said cause, to wit: [111]

[Title of District Court and Cause.]

ORDER DIRECTING TRANSMITTAL OF
ORIGINAL EXHIBITS

This matter coming on for hearing upon the oral motion of J. S. Middleton, attorney for the Defendants and Appellants, Sam Schnitzer, Harry J.

Wolf, Rose Schnitzer and Jennie Wolf, individually and as a co-partnership doing business under the name and style of Alaska Junk Co., for the order of this Court directing that all of the original exhibits herein, both documentary and those not of a documentary character, be sent to the Circuit Court of Appeals of the Ninth Circuit upon appeal of this cause, and the Court being of the opinion that such motion is well taken, it is at this time:

Ordered that the Clerk of this Court shall transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit all original exhibits filed in this case, in lieu of copies of the same, to include all exhibits both documentary and non-documentary in character, and that the said original exhibits shall be a part of the transcript of record from this Court to said Appellate Court.

Dated this 10th day of December, 1942.

LEON R. YANKWICH,

Judge.

[Endorsed]: Filed December 12, 1942. [112]

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 112 inclusive, constitute the transcript of record on appeal from a decree of said Court in

a cause therein numbered Civil 706, in which California Corrugated Culvert Co., a corporation, and Leo T. Crowley, Alien Property Custodian of the United States are plaintiffs and appellees, and Sam Schnitzer, Harry J. Wolfe, Rose Schnitzer, and Jennie Wolf, individually, and as a co-partnership doing business under the name and style of Alaska Junk Co. are defendants and appellants; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed therein by appellants and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof, and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said Court in said cause, as the same appear of record and on file at my office and in my custody, in accordance with the said designation.

I further certify that the cost of the foregoing transcript is \$5.00 for filing Notice of Appeal, and \$24.65 for comparing and certifying the within transcript, making a total of \$29.65 and that the same has been paid by the said appellants.

I further certify that I am transmitting with said transcript, the duplicate of the reporter's transcript filed in the Clerk's Office.

I further certify that I am transmitting to the Circuit Court of Appeals for the Ninth Circuit, pursuant to an order of the District Court of the United States for the District of Oregon, all of the original exhibits introduced as evidence at the trial

of the said cause, and listed and described in the duplicate transcript of the evidence.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 21st day of December, 1942.

[Seal]

G. H. MARSH,

Clerk. [113]

EXHIBIT "A"

TRANSCRIPT OF PROCEEDINGS ON
TRIAL OF CAUSE

This cause came on for trial before the Honorable Leon R. Yankwich, United States District Judge for the Southern District of California, assigned to sit in the United States District Court for Oregon.

Pretrial proceedings were had by and under direction of the Court prior to the trial in open court. At the pretrial proceedings all exhibits were identified and given a number, subject to being offered in evidence at the trial and subject to the ruling of the Court on admissibility.

The hearing and presentation of evidence commenced on August 19, 1942, and was concluded on August 22, 1942, and the cause was thereafter orally argued by counsel on August 24 and 25, 1942. At the commencement of the trial the Court stated that the pretrial order had been approved by him and filed.

The following counsel represented the respective parties:

James H. Hazlett, Esq., Assistant United States Attorney, appeared on behalf of plaintiff, Leo T. Crowley, Alien Property Custodian of the United States

Theodore J. Geisler, L. R. Geisler and William S. Graham, Esqs., appeared on behalf of plaintiff, California Corrugated Culvert Co., a corporation.

J. S. Middleton, Esq., appeared as attorney for the defendants.

OPENING STATEMENTS

In opening statements for plaintiff, Mr. Graham stated that this was a patent suit for an injunction and accounting for alleged infringement of United States Letters Patent No. 1,747,942, granted on February 18, 1930, in the name of Karl Lanninger for "Pipe Line," on an application filed in the United States Patent Office on October 8, 1923, that:

"The nature of the invention is a pipe joint in connection with pipes. It comprises a sleeve having an internal groove within one end of the sleeve, and a gasket or elastic packing member mounted in that groove by means of a flange or a rim and having an extended free portion circumferentially enclosing an unthreaded pipe member, providing hinged relationship between the sleeve and the pipe member, combined with

means to hingedly secure the sleeve upon the unthreaded pipe end.”

That the action, as originally filed, included the patentee, Karl Lanninger, as a party plaintiff; that said Lanninger was an alien enemy national of Germany, and on June 18, 1942, Leo T. Crowley, Alien Property Custodian of the United States, had vested title to the patent in the Alien Property Custodian, subject to which the District Court had, on motion, entered an order substituting said Alien Property Custodian for said Lanninger; that the plaintiff, California Corrugated Culvert Co., a California corporation, was an exclusive licensee under the patent in suit, for irrigation purposes; the jurisdiction of the Court was predicated on the patent laws of the United States, and that defendants were inhabitants of and maintained an established place of business within the judicial district of the court, and were charged with acts of infringement within said district; that Claim 3 was the only claim of the patent charged to be infringed; that the charge of infringement is predicated on manufacture and sale by defendants of devices illustrated by defendants' pretrial exhibits 8 and 47 and 3 and 48.

In opening statement for the defendants, Mr. Middleton stated that the alleged infringing devices are claimed by the defendants to be dissimilar to the disclosures of the patent in suit, and are not infringements of Claim 3 thereof, for the reason that the patent in suit, and particularly Claim 3 thereof, discloses as one of the distinguishing char-

acteristics of the invention a flange packing, whereas the accused devices employ a U or V type packing, as distinguished from a flange packing. He also stated that all of the various component parts of the invention disclosed by the patent in suit are old. Further, he stated his belief that the proof would disclose that the patent in suit is but a paper patent, never reduced to practice, and that the commercial product of the plaintiff, California Corrugated Culvert Co., exemplified by Exhibit 17, is not an exemplification of the disclosures of the patent in suit, or Claim 3 thereof, but an exemplification of the disclosures of a certain patent to one R. H. Pierce, patentee; and that the defendants claim that the alleged infringing devices respond to the disclosures of the Pierce patent and not to the disclosures of the patent in suit. He further raised the issue that the plaintiff, California Corrugated Culvert Co., by its conduct in defining pipe couplers responsive to the disclosures of the Pierce patents and equipped with interior locking means as being without the scope of the disclosures of the patent in suit, is now estopped to assert as within the disclosures of the claims of the patent in suit pipe couplers such as those now accused as infringements, being couplers responding to the disclosures of the Pierce patent, and additionally equipped with locking means.

Mr. Middleton further referred generally to the other defenses set up in the answer and in the pre-trial order, stating that these would develop as the trial proceeded.

Counsel for the parties having thus defined their respective positions, trial proceeded with:

PLAINTIFFS' EVIDENCE

BALDWIN VALE

was thereupon produced as a witness in behalf of the plaintiffs and, having been first duly sworn, was examined and testified as follows: [24*]

Mr. Graham: If your Honor please, before proceeding with the examination of the witness I will say that the pre-trial order stipulates title, but as a matter of form I offer in evidence as Plaintiffs' Exhibit 11 a copy of United States Letters Patent to Karl Lanninger, No. 1,747,942, granted February 18, 1930, for pipe line, on an application filed October 8, 1923, Serial No. 667,353.

The Court: It may be received.

(The copy of Patent 1,747,942, so offered, having been previously marked Pre-Trial Exhibit 11, was thereupon received in evidence as Plaintiffs' Exhibit 11.)

[Printer's Note: Plaintiffs' Exhibit No. 11 is set out in full at page 383 of this printed record.]

Mr. Graham: And as Plaintiffs' Exhibit 12 a certificate of search in the Patent Office showing at the time of the original suit that the title was still in Lanninger.

The Court: It may be received.

* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of Baldwin Vale.)

(Said certificate of search above referred to, having been previously marked as Pre-Trial Exhibit 12, was thereupon received in evidence as Plaintiffs' Exhibit 12.)

Mr. Graham: And as Plaintiffs' Exhibit 13 a copy of license from Lanninger to the plaintiff herein, California Corrugated Culvert Company.

[25]

(Said license agreement, Lanninger to California Corrugated Culvert Company, having been previously marked as Pre-Trial Exhibit 13, so offered, was thereupon received in evidence as Plaintiffs' Exhibit 13.)

Mr. Graham: Exhibit 14, if your Honor please, which I now offer, is merely a consent from Lanninger to the plaintiff California Corrugated Culvert Company that it might proceed to use his money and bring suit.

The Court: All right.

(The copy of authorization by Karl Lanninger above referred to, so offered, having been previously marked as Pre-Trial Exhibit 14, was thereupon received in evidence as Plaintiffs' Exhibit 14.)

Mr. Graham: And as Plaintiffs' Exhibit 15 plaintiff offers merely a letter from Lanninger showing that he resided in Germany, in support of the allegation that he was a resident of Germany.

The Court: All right.

(Testimony of Baldwin Vale.)

(The letter above referred to, Lanninger to California Corrugated Culvert Company, so offered, having been previously marked as Pre-Trial Exhibit 15, was thereupon received in evidence as Plaintiffs' [26] Exhibit 15.)

The Court: This is merely an authorization to pay \$25.00 to somebody.

Mr. Graham: That is all we desire to do, to show the date of the letter. It has no relevance to the suit, but we allege in the complaint that the original applicant Lanninger was a resident of Germany, and it was denied by the defendant. That was all the proof that we had he was a resident of Germany.

The Court: Well, this letter is from Frankfurt-on-Rodelheim, dated March 14, 1941, addressed to the Corrugated Culvert Company at Berkeley, California, authorizing the payment of \$25.00 to a patent attorney named Walter S. Bleston, and to apply it to the accounting as of the date of November 28, 1940, signed "Greetings, Lanninger."

Mr. Graham: Thank you, your Honor. And as Plaintiffs' Exhibit 80 there is offered a certified copy of Vesting Order No. 27, dated June 18, 1942, of the Alien Property Custodian of the United States vesting title and all interest thereunder in the Lanninger patent in suit in the Alien Property Custodian of the United States.

The Court: All right. It may be received.

(Testimony of Baldwin Vale.)

(Said certified copy of Vesting Order No. 27, above referred to, so offered, having been previously marked as Pre-Trial Exhibit 80, was thereupon received in evidence as Plaintiffs' Exhibit 80.) [27]

Direct Examination

By Mr. Graham:

Q. Please state your name?

A. Baldwin Vale.

Q. And your address?

A. 333 Montgomery street, San Francisco.

Q. What is your occupation?

A. I am a registered patent attorney.

Q. How long have you been a registered patent attorney?

A. Well, I have been a patent attorney forty-five years. They didn't register when we first began, but I have been registered ever since they started that, in 1907 or '08, as I remember.

Q. In the course of your practice as a patent attorney have you ever prosecuted any patents for mechanical devices such as pipe joints?

A. Many of them; yes, sir.

Q. You are generally familiar with the subject?

A. Yes.

Q. What other mechanical experience have you had?

A. I have been a bench mechanic, engine tender, fireman, journeyman electrician, and then I graduated into a patent attorney.

(Testimony of Baldwin Vale.)

Q. Have you ever been in the manufacture of any mechanical devices?

A. Yes, I have owned and operated a factory for the manufacture of [28] agricultural implements in Stockton, California, and I also worked for the Holt Manufacturing Company as a superintendent of their Houser & Haynes Harvester Works in Stockton, a subsidiary, where I built plows and harvesters and any other agricultural implement that was in their line.

The Court: Other than experience you have not had any formal education in mechanics, such as a degree of mechanical engineering or the like?

A. Well, your Honor, I won't say that I have had formal schooling, but I have educated myself in it.

The Court: I mean formal schooling.

A. No.

The Court: You don't have any degree as a mechanical engineer?

A. No. Force of circumstances made that impossible.

The Court: That is all right; no criticism at all. I just wanted to know what your experience has been.

Q. (By Mr. Graham) Have you served as a witness in other courts in analyzing patents?

A. Oh, yes; since 1906. I served the Otis Elevator Company; that was the first case.

Q. Approximately how many times have you

(Testimony of Baldwin Vale.)

served as a witness in federal court analyzing patents?

A. Well, through the years, about thirty-five years, I have served off and on—perhaps not an average of once a year, but pretty close to that.

[29]

The Court: Have you appeared before any of the present judges of the Northern District of California, Judge St. Sure, Judge Roche or the late Judge Louderbach?

A. Oh, yes, in San Francisco; all of them.

The Court: You have never appeared in the Southern District of California?

A. Yes, I have been in Oregon before.

The Court: I mean the Southern District of California, Los Angeles. You haven't been in my court, have you?

A. No, I haven't been south. They have plenty of experts down there.

Mr. Graham: Now is it your Honor's practice to then permit opposing counsel to cross examine as to qualifications?

The Court: Not unless he wishes to; not unless he desires to at the present time. This is a mere foundation. Go ahead with your examination.

Q. (By Mr. Graham) Have you made a study, Mr. Vale, of the Lanninger patent, No. 1,747,942?

A. Yes, sir; I have.

Q. Will you explain to the Court what you conceive the invention disclosed thereby.

Mr. Middleton: Just a moment. If the Court

(Testimony of Baldwin Vale.)

please, I don't think that question is very well framed. I think the attention of the witness should be drawn to the various specific parts, and he may then explain the specific parts. [30]

The Court: No, he may give his opinion on the entire structure, read the specifications and explain them if they need explaining.

A. In this Lanninger patent he starts off, the first line, "This invention relates to a line of conduits". Then he states the purpose of showering and irrigating, and he refers to rubber packing cups. His particular objective seems to be a certain degree of flexibility imparted to the pipe line. He makes the salient feature of it a rigid sleeve. I can understand why at that period he thought that that was quite a contribution to the art, which it was, because I was familiar with the discharge pipes in use in marine dredging——

Mr. Middleton: Just a moment. If the Court please, I don't see——

The Court: That is rationalizing your conclusions. I limit experts very much. [31]

All we want them to do is to interpret, just like a doctor would explain technical language, interpret this to me where it needs interpretation. If the language is clear then the patent itself is clear enough. I don't need an expert to explain it to me. But to go on and explain and bring in the prior art, that is not my idea of expert testimony in the law of patents.

(Testimony of Baldwin Vale.)

I want the expert to be strictly confined to advising the Court what his opinion is, an opinion which I may entirely disregard and no court says I must follow. [32]

So I want to limit this man, who is not a scientist but merely a patent attorney, one who is not a scientist in the field, I am going to limit him purely to interpreting this patent insofar as it is mysterious to me, and I am not going to allow him to give me lectures and decide the case for me, you see.

Mr. Graham: I think the answer was probably a little bit broader than the question.

The Court: We will strike out the statement beginning with what "I can understand". We don't want any reasons or trying to find out what you think the inventor thought. What the inventor thought he puts right in the paper here. So limit yourself to interpreting this, and then if you feel that this did not exist in the prior art, why, just tell me whether in your opinion the prior art did or did not disclose that or that feature. Now with that understanding, I won't interrupt you. [33]

You may then proceed from there.

Q. (By Mr. Graham) Did the patentee Laninger describe how he accomplished the invention? A. Very distinctly; very distinctly.

Q. With relation to flexibility of the pipes?

A. Flexibility of the pipe line, you mean?

Q. Yes.

A. Yes, he did, very distinctly.

(Testimony of Baldwin Vale.)

Q. In what way does he describe that?

A. He describes it as a rigid sleeve attached to——

The Court: Mr. Vale, you see I have the paper patent, and if you indicate the column and line then I can follow you. Have you the patent in front of you? [35]

A. Take Figure 1, for instance. The "a" represents a rigid sleeve to which a pipe end "c" is affixed, in this case by threading. This rigid sleeve "a" has an extension "a₁", or lug, and then telescoping into the end of the sleeve at "a₂" is an unthreaded pipe end of considerably less diameter than the end "a₁". This unthreaded pipe end has an eye, "c₁", which slides into the lug "a₁", and and there is a transverse hole to receive the cotter pin "d", which very loosely fits the holes both in the eye, "c₁", and in the lug "a₁". This permits a free swinging of the unthreaded end of the pipe within the end of the sleeve into which it is telescoped. Interposed between the interior of the sleeve "a" and the unthreaded pipe end is a packing element having a free cylindrical flange "b". That shows in Figure 3. That has what Lanninger calls a flange "b₂" extending up into an annular groove marked "e" in Figure 1. When the unthreaded pipe end is forced into the packing member "b" it expands flange "b₂" up into the groove "e", making a pressure tight seal within the sleeve and contacting the unthreaded end of the pipe. The

(Testimony of Baldwin Vale.)

resilient ele- [36] ment, the packing, provides for elasticity to permit the hinged action of the two pipe ends "c" relative to each other. Then he provides a means which is identified as "a₁", "c₁" and "d" for hingedly securing said sleeve on the pipe having the unthreaded end. It is noticeable in the drawing and also in the exhibit model that the hinged action is very loose, and it does not determine the angularity of the two pipes, but merely follows. It is a link to prevent longitudinal separation of these pipe ends. It is not intended to hinge the two together but to prevent them from separating.

Q. What is the relation of the pipes as to their axial alignment?

A. In the drawing there is not true axial alignment, but there is a freedom of motion admitted by the packing member and limited only by the clearance between the inner diameter of the sleeve and the outer diameter of the unthreaded pipe end.

Q. Would that description which you have just given read on each figure of the drawing of the Lanninger patent?

A. That reads particularly on figure 1.

Q. Would it read on any other figure?

A. Yes, it would read on practically all of them; in fact, on all of them, especially on Figure 3, in the side outlet, which has an internal groove in the sleeve enclosing and encircling the free end of the pipe. It applies in Figure 4, in which here we

(Testimony of Baldwin Vale.)

have a double ended sleeve with free pipe ends in each [37] end of the sleeve telescoped therein with freedom of movement laterally relative to the axis of the sleeve.

Q. Is there any modification of that structure shown in Figure 3?

A. The modification in Figure 3 is that the part that is marked "a₁" in Figure 1 is screwed on to the end of the sleeve to abut the opposite sides of the flange "b₂" on the packing element.

Q. Now referring to Figure 1 and also Figure 4, as well as the side outlet in Figure 3, how is that flange maintained in that groove?

A. It is frictionally retained.

Q. That is, I am speaking now of the flange of the elastic packing member "e".

A. The flange is "b₂"; the groove is "e".

Q. Well, the flange "b₂" in the groove "e".

A. It is a fit. The resiliency of the packing element, which is of rubber compound, can be deformed so that the flange will enter that internal groove "e" and be retained by frictional engagement with the walls of that groove. I might add that it is further retained in the groove by the expansion of the packing incidental to forcing the larger diameter of the unthreaded pipe end into the smaller diameter of the cylindrical portion of the packing.

The Court: But in all these figures, Mr. Vale, both 1, 3 and 4, there is a space left between—what do you call this [38] here?

A. The sleeve.

(Testimony of Baldwin Vale.)

The Court: —the sleeve and the pipe, the sleeve below the flange, you see. A. Yes.

The Court: And the model before me would indicate that that method of construction is contracting the opening on the top part which has the flange in it, the smaller opening, which would almost result, assuming a straight pipe, in a space always being there? A. Yes.

The Court: And the only thing that really fits tight is the flange; is that correct?

A. Well, the flange will fit tight in the groove "e".

The Court: In the groove.

A. But the elasticity of that packing when the larger pipe is forced into the smaller opening in the packing, it expands the packing and stretches it tighter around the end of the pipe.

The Court: Yes, that is right.

A. Contracts, actually; contracts on the end of the pipe.

The Court: So there is—you really get a rigid connection, but because the rigid connection is formed by flexible material it retains certain flexibility; is that correct?

A. Oh, yes. At all times, in fact—I don't like to use the word "rigid" there, because the rubber, in fact, becomes elastic. [39]

The Court: I see.

A. It is always elastic and always permits a hinged action.

The Court: I see. Well, all right, to use your own words. In other words, if you take—I don't

(Testimony of Baldwin Vale.)

know how long these pipes are, irrigation pipes—I have lived in the irrigated country in California, and most of our irrigation is done by ditches—but I assume the pipe lengths are what—ten or twelve feet?

Mr. Graham: Approximately twenty feet.

The Court: Twenty feet. I presume the result would be that if you picked up one length of pipe which had been attached to another and wanted to move it away the coupling would give just enough that there would be no danger of breaking there.

A. Well, he would first withdraw the end of the pipe from the coupling and then pick it up. It would be free then. He would pick up twenty feet of pipe with a sleeve on one end. If your Honor would permit I would like to demonstrate with one of these.

The Court: That is perfectly all right. As you speak, give the exhibit numbers.

A. Well, almost any of them. Defendants' No. 48-B—

Mr. Graham: 48 that is.

A. All right. There is a "B" on here. I don't know what it means. Your Honor will notice that the flexing of the pipe is entirely due to the elasticity of the packing. Now this latch— [40]

The Court: Isn't that coupled also with that looseness because of the space that is left, regardless of that? A. Yes.

The Court: If you take the rubber out and put that in there it would still move?

A. That is what I wanted to show.

(Testimony of Baldwin Vale.)

The Court: Because you have a smaller and a larger pipe.

A. The possible angulation of the pipe relative to this end of the sleeve.

The Court: Yes.

A. Now the rubber does not diminish that in any way.

The Court: No.

A. Nor does any latch determine the angularity of movement. It keeps it from falling apart.

The Court: It still keeps them together.

A. He didn't say "hinged together" in the claim. He said "hingedly secure". And when the pressure goes on that is the effect (illustrating). When the pressure is off you can unlatch it, pull it out.

The Court: I see.

A. So that there is a distinct difference between the hinging of the pipe together—that is, securing them hingedly is not limited in any sense by the latch. The latch does not determine the angle of deviation.

The Court: All right. [41]

Q. (By Mr. Graham) Is there any particular form or shape of gasket that is essential and necessary to meet the invention disclosed in the Lanninger patent?

Mr. Middleton: Now just a moment. If the Court please, that calls for the witness' conclusion on the very thing that the Court must determine.

The Court: No, he may give his opinion as to whether it calls for any particular type of construction; whether the embodiment as exemplified by Fig-

(Testimony of Baldwin Vale.)

ures 1, 3 and 4 is merely one form or whether you can do it in other ways, and illustrated by reference to the specifications.

Mr. Middleton: But only in the light of the claim, your Honor.

The Court: What?

Mr. Middleton: Only in the light of the claim language.

The Court: That is true.

Mr. Middleton: You see, the question does not limit——

The Court: The drawings and specifications may not alter the claim, but they may be used in pointing out the meaning of the claim.

Mr. Middleton: That is true, your Honor, but the claim is the basis.

The Court: That may be true, but the whole patent must be read as a whole, and unless the claim is limited by the description the patentee is entitled to the benefit of his speci- [42] fications. They cannot change his claim but they may explain it where it is not plain on its face.

Mr. Middleton: That is just the point here, your Honor; that everywhere there is the word “flange” in the complaint and in the specifications.

Mr. Graham: I will withdraw the question, if your Honor please.

The Court: All right.

Q. (By Mr. Graham) What in your opinion, Mr. Vale, is meant by the flange “b₂”?

A. That is a rim extending around the cylindri-

(Testimony of Baldwin Vale.)

cal part of the packing, a protrusion beyond the periphery of the packing, for the purpose of anchoring that packing within the sleeve.

Q. What do you mean by anchoring it in the sleeve?

A. Well, Lanninger says "frictionally retained". In other words, there are no screws through it or mechanical means to hold it in there because it cannot possibly get out.

Q. And that forwardly extending part marked "b" which encloses the unthreaded pipe end, is that fixed in relationship like the flange that you spoke of?

A. No, that is free of the sleeve, and it is frictionally fixed on the outer periphery of the unthreaded pipe end. It is perfectly free with respect to the sleeve because of the resilience of the packing, the packing acting as a hinge element.

Q. Does the flanged portion move with the relative movement of [43] the axis of the pipe?

A. No, sir; that is fixed in the groove.

Q. Does the free cylindrical portion move with the relative movement of the pipe?

A. It does. Now I assume that you do not want to go into the fine distinctions of molecular movement in rubber. Rubber may flow or it may expand or contract or displace.

The Court: He is not limiting himself to rubber. That is why it would not be material, because he said that any flexible material would do. He used rubber, but he may have had to substitute something else.

(Testimony of Baldwin Vale.)

A. Well, it could be leather or fabrics. There are a number of things——

The Court: It could be anything that gives.

A. That is right.

The Court: So he says.

A. He says “frictionally retained”. In other words, it is wedged up in there and the connection of the wedge is frictional.

Q. (Mr. Graham) Now referring to Claim 3 in the patent do you find in the disclosure of the Laninger patent a pipe joint in connection with pipes one of which has an unthreaded end?

A. Will you read the first part of the question?

(Last question read.) [44]

A. Yes. He says, “A pipe joint in connection with pipes one of which has an unthreaded end”. That is in Claim 3.

Q. And you find that——

The Court: Point it out. He wants to find it. Point it out in the specifications or as shown in the drawings.

A. You want me to point out in the drawing——

Q. (By Mr. Graham) I want you to point out in the drawing if you find that element in the drawings or in the specifications.

A. Yes. There are two pipes in Figure 1 joined by a joint, one of which has an unthreaded end.

Q. Do you find in the drawings and in the specifications a rigid coupling sleeve for coupling said pipes?

(Testimony of Baldwin Vale.)

A. Yes; the rigid coupling sleeve is identified as "a" in the drawings, Figure 1.

Q. Does the unthreaded end of the pipe extend into that sleeve?

A. It does.

Q. Do you find in the drawings that the sleeve has an internal annular groove in the inner surface?

A. It has. It has the groove "e".

Q. Do you find a packing of elastic material in said coupling sleeve?

A. I do. That would be the part "e" and "b".

Q. Do you find such an elastic packing member consisting of a free cylindrical part frictionally enclosing the unthreaded pipe end? [45]

A. I do. That would be the part "b" that is stretched around the unthreaded pipe end in Figure 1.

Q. Do you find that the packing of elastic material has a flange frictionally retained in the groove of said sleeve?

A. Yes. That would be the flange "b₂" frictionally retained in the groove.

Q. Do you find means for hingedly securing said sleeve on the pipe having the unthreaded end?

A. Yes, sir. That would be in Figure 1, the lug "a₁", the eye "c₁", on the unthreaded end, both of which have registering poles therethrough to receive the pin "d".

Q. In connection with the packing of elastic material in the coupling sleeve what is the function of

(Testimony of Baldwin Vale.)

the flanged rim which is retained in the groove in the sleeve?

A. The function of that flanged "b₂" is to anchor the packing within the sleeve and also to pack the groove "e" against leak- [46] age.

Q. What is the function of the free cylindrical portion of the packing member?

A. The free cylindrical portion "b" packs against the outside of the unthreaded end to prevent leakage at that point. In other words, the pressure is held against leakage, either under the packing member or around the packing member with respect to the pipe and the sleeve.

Q. Does the sealing effect of the rim and the free cylindrical portion of the packing member in any way affect the hinged relationship of the pipes?

A. No. It is flexible enough to permit that fully without interference.

Q. In the operation of such a joint what advantage would that accomplish?

A. It would permit a pipe line to adjust itself to the contour of the ground and also to bend around curves on the flat plane.

Q. Now does the securing means which you said was split into the three portions, "a₁", "c₁" and "d", interfere in any way with the flexibility of the joint?

A. None whatever. It allows their respective attached ends, either the sleeve or the unthreaded end, perfect freedom of movement.

Q. I am referring—

A. I might add to that perfect freedom of move-

(Testimony of Baldwin Vale.)

ment except [47] longitudinally. The function of that “hingedly secured” is to prevent the longitudinal separation of the pipe ends, but otherwise there is perfect freedom of movement hingedly.

Q. What would that securing means accomplish with relation to the longitudinal movement?

A. It prevents a longitudinal separation of the pipe ends in the pipe line.

Q. Why is it necessary to prevent longitudinal separation?

A. Well, it will blow apart by the pressure exerted within the pipe line.

Q. Does pressure exerted within the pipe line have any effect on the elastic packing member?

A. It forces them more tightly against the surfaces that they are supposed to pack, the cylindrical portion around the pipe and the flanged portion “b₂” within the groove.

Q. Now referring to Defendants’ Exhibit 47—may he take that exhibit, if your Honor please?

The Court: Yes. He has it, hasnt he?

The Witness: Yes, I have it.

Mr. Graham: I believe counsel have agreed—I don’t know just what the position of the Court will be with respect to it, but this exhibit has been offered on pre-trial and it is admitted by the pre-trial proceedings that there has been manufacture of this device by the defendants in a modified form, and such manufacture is defined in the pre-trial order. I [48] wish to have the witness testify relative to this ex-

(Testimony of Baldwin Vale.)

hibit and still have it in evidence as defendants' exhibit.

The Court: You are not adopting it by merely using it for the purpose of demonstrating. I presume you want to demonstrate some similarity between it and the device similar in structure. You do not adopt it as your exhibit. Of course in this pre-trial method of putting in the exhibits you have the advantage of knowing what the other person's exhibits are. But you are not making any admission against your interest by using a device they furnished you.

Q. (By Mr. Graham) Referring to Defendants' Exhibit 47, do you find therein a pipe joint in connection with pipes one of which has an unthreaded end? A. Yes, sir.

Q. Which member is that?

A. That is the member 47-A has an unthreaded end.

Q. Do you find a rigid coupling sleeve for coupling said pipes into which said unthreaded end extends? A. I do; yes, sir.

Q. Has the sleeve an internal annular groove in its inner surface? A. It has.

Mr. Graham: May I ask your Honor if you desire him to mark these parts with a pencil as we go along?

The Court: I don't think it is necessary, because they are [49] visible or palpable through the teaching.

Mr. Graham: It seems to me it is so apparent it is not necessary to mark them.

(Testimony of Baldwin Vale.)

The Court: Yes, you don't have to mark them.

Q. (By Mr. Graham) Is there in that exhibit a packing of elastic material in the coupling sleeve consisting of a free cylindrical part frictionally enclosing the unthreaded pipe end? A. Yes.

Q. And does the packing of elastic material have a flange frictionally retained in the groove of said sleeve? A. It has.

Q. Is there means for hingedly securing said sleeve on the pipe having the unthreaded end?

A. There is. This is this hook or eye member.

Q. What does that hook do with relation to the rigid sleeve?

A. There is a gap in the flange of the end of the rigid sleeve into which this eye hook enters, and when this hook enters that recess or gap and the unthreaded pipe end is turned laterally then that hook engages the flanges on the outer end of the sleeve to secure the sleeve to the unthreaded end.

Q. When in that relationship that you have just described is there a hinged relationship between the unthreaded pipe end and the sleeve member?

A. There is. There is the prevention of the longitudinal movement to separate the pipe ends, but there is no interference [50] with the normal rotation of lateral angularity of one pipe toward the axis of the other. It is just as free when that hook is engaged as it is when the hook is not engaged.

Q. Have you examined the flexible elastic member within the sleeve in Exhibit 47? A. I have.

(Testimony of Baldwin Vale.)

Q. Will you please describe its function or its mode of operation.

A. The function of the cylindrical portion, this free cylindrical portion, in that it is not attached to any other part, is to contract by natural contraction of rubber in adjusting itself over a larger diameter than the diameter of the cylindrical portion to hug the end of the pipe by just natural contraction and friction.

Q. What is the operation of the rim around that elastic packing member?

A. The rim, which is a continuation of the cylindrical portion through its inherent body—that is, it is a homogeneous compound—is to fit within the groove, within the annular groove within the interior of the sleeve, the rigid sleeve.

Q. How is it held in there?

A. Frictionally.

Q. Is there any other means for holding it in there?

A. No, nothing except that its diameter and shape perfectly fits the inner diameter and shape of the groove in the sleeve. [51]

The Court: Doesn't it fit over the sleeve rather than fit into a groove, the way this patent teaches?

A. No. The patent teaches a groove in the sleeve, an interior groove.

The Court: Yes, but I mean the manner in which the rubber or what element do you call that?

A. The packing.

(Testimony of Baldwin Vale.)

The Court: The packing “frictionally enclosing the unthreaded pipe end”.

A. The dictionary definition shows this to be a flange fitting within the groove. The groove is semi-circular and this is substantially semicircular.

The Court: Doesn't it fit over the end of the pipe?

A. It fits over the end of this pipe, as I just demonstrated.

The Court: Yes.

A. That fits snugly down over it to the extent that it contracts the rubber.

The Court: I see now.

A. This has to be assembled first. That is, the rubber packing has to be assembled first into the sleeve with the flange extending into the groove of the sleeve and the cylindrical portion pointing away from the entrance to the sleeve, so that when this unthreaded end is pushed in there is no resistance except the frictional resistance of the cylindrical portion.

The Court: All right. [52]

Q. (By Mr. Graham) Does it operate in the same manner and with the same function or mechanical force as the elastic packing member in the Lanninger patent?

A. Definitely, yes.

Q. Does that elastic packing member in Exhibit 47 normally remain in the sleeve?

A. At all times unless it is manually removed by intention.

(Testimony of Baldwin Vale.)

Q. Does it at any time become a portion slid over or enclosing the unthreaded pipe end when the pipe end is not inserted in the sleeve?

A. Well, no. The cylindrical portion then is free. It is standing on its own. It has no function to perform at that condition until the pipe end goes in.

Q. Is it a separable part of the sleeve itself and normally retained in the sleeve?

A. It is normally retained in the sleeve. It is part of the sleeve assembly.

Q. What would you say as to the sealing effect of that elastic packing member in Exhibit 47?

A. Presuming it to be a water pipe, it prevents leakage of water at that joint where it is sealed, the joint being sealed by that packing member. The function of the packing member is to seal the packing member against leakage—that is, to seal the sleeve against leakage between the packing member and the sleeve and against the tube to prevent leakage between the pack- [53] ing member and the tube. In other words, it is a seal in two places.

Q. Which portion of the elastic packing member makes the seal against the sleeve member?

A. The flange.

Q. By “the flange” which portion do you mean?

A. I mean the flange extended beyond the cylindrical portion up into the groove.

Q. What portion of the elastic packing member makes the seal against the unthreaded pipe end?

A. The cylindrical portion.

(Testimony of Baldwin Vale.)

Q. Is that cylindrical portion a free cylindrical portion?

A. A free cylindrical portion; yes, sir.

Q. Does the elastic packing member operate in the same manner as the elastic packing member in the Lanninger patent? A. Exactly.

Q. Referring to Exhibit 48 of defendants, will you please examine that exhibit. You have previously seen and examined that exhibit?

A. I have, Exhibit 48, defendants'.

Q. Do you find therein a pipe joint in connection with pipes one of which has an unthreaded end?

A. Yes.

Q. Which is the unthreaded end?

A. The unthreaded end is the free length of pipe with a block [54] welded on to it.

Q. Do you find a rigid coupling sleeve for coupling said pipes?

A. I do. That is this fabricated end with various convolutions on it and flanges.

Q. You are identifying a member having——

A. Having a latch riveted on it.

Q. ——one end enlarged in diameter?

A. That is it; substantially bell-shaped.

Q. Are the parts adapted to fit together so that the sleeve receives one end of the unthreaded pipe?

A. They do.

Q. And it extends thereunto?

A. Yes; no rubber in that.

Q. Do you find that the sleeve has an interior annular groove in the inner surface?

(Testimony of Baldwin Vale.)

A. It is substantially semicircular in cross section.

Q. And does the joint have a packing of elastic material in the coupling sleeve?

A. It does.

Q. And of what does the packing of elastic material consist?

A. It is a rubber member having a free cylindrical portion with a flange extending up into the groove in the sleeve.

Q. How is it retained in the groove?

A. It is retained in there frictionally by its size and natural adhesion or frictional contact with the interior of the grove. [55]

Q. Do you find means for hingedly securing the sleeve on the pipe having the unthreaded end?

A. I do.

Q. What does that consist of?

A. That consists of—when the unthreaded pipe end is telescoped within the sleeve and within the packing member I find a latch on the sleeve member adapted to engage an undercut block having a substantially square eye portion which is welded to the unthreaded end of the pipe a distance back from the extreme end thereof, and I find that this latch drops down into engagement with this block, and that prevents the longitudinal separation of the pipe ends or withdrawal of the unthreaded end from the packing member.

Q. What do you mean by “that prevents”?

(Testimony of Baldwin Vale.)

A. This hinged connection here prevents the lateral—or to put it positively, it securely retains or connects the two pipe ends together so that they cannot separate, and still leaves a freedom of movement in angularity regarding the axis of the pipe line.

Q. Now when the latch is unhooked is there any hinged relationship between the pipes?

A. There is freedom of movement determined only by the difference in diameter of the unthreaded pipe end and the interior diameter of the sleeve. There is perfect freedom of movement without the latch engaged. [56]

Q. Does the latch add anything to the hinged movements of the two portions of pipe relatively?

A. No, it neither adds to nor takes away from the freedom of movement between the pipe ends with respect to the packing member.

Q. Does the latch member that you refer to operate in the same manner as the member of the Lanninger patent which extends from the sleeve outwardly in the nature of an arm numbered “a₁”?

A. That is it. That is there.

Q. And what member would that correspond to in Exhibit 48?

A. That would be the latch and its pivot as attached to the sleeve member.

Q. And is there any portion in that latch device that would correspond to the member “c₁” in the Lanninger patent, which has a dog member or lug on the free end of the pipe?

(Testimony of Baldwin Vale.)

A. Yes. That is what Lanninger calls the eye, is it not?

Q. Yes. A. The eye, "c₁".

Q. What portion is that in the device of Exhibit 48?

A. That would be this square block with the notch in it, that notch corresponding to the eye in which is the hook—the eye is undercut and the hook hooks into it. It is a hook and eye, in other words.

Q. Have you any member or element in that Exhibit 48 which corresponds with the cotter pin "d" in the Lanninger patent? [57]

A. Yes, there is really two elements that correspond. The engagement of the hook with the eye here allows a freedom of rotation and angularity of the unthreaded end, and the pivot of the hook as attached to the sleeve permits a freedom of movement up and down but not laterally. This can go up and down but it cannot go laterally, so the lateral movement is taken up in the hook and eye engagement which corresponds to "d" in Lanninger for hingedly securing these members together.

Q. Is there any description in the Lanninger patent of an easy play or easy movement or ample play?

A. He says in line 26, "a certain degree of flexibility is imparted to the pipe line."

Q. Now read at Column 2, lines 69, 70 and following.

(Testimony of Baldwin Vale.)

A. He says, "The easy movement of the hinge "c₁", "a₁" and the ample play of the cotter pin in the borings of the hinge further increase the flexibility of the joint of the pipes and the facility of this joint to adapt itself to the irregularities of the ground and the available space."

Q. Would that Exhibit 48 operate in that manner?

A. Exactly. It can adjust itself to irregularities in the ground. For instance, in going up a grade or in coming down a grade or on the level plane it can adjust itself to a lateral bending of the pipe. In other words, there is universal movement there within the limitations of these two diameters.

Q. Does the elastic packing member in the device in Exhibit 48 [58] operate in the same manner as the elastic packing member in Defendants' Exhibit 47?

A. It does. They both follow the movements of the pipes relative to each other, regardless of the latch and regardless of the packing member. The packing member follows the movement of the pipes relative to each other. The securing member does the same.

Q. Is the sealing function of the gasket the same in Exhibit 48 as it is in 47? A. Yes.

Q. Is the retention in an annular groove internally of the pipe the same as it was in 47?

A. Yes—internally of the sleeve.

Q. Internally of the sleeve? A. Yes.

Mr. Graham: That is the plaintiffs' prima facie case, if your Honor please.

(Testimony of Baldwin Vale.)

The Court: We will take our adjournment before we start the cross examination of Mr. Vale.

(Thereupon an adjournment was taken until tomorrow, Thursday, August 20, 1942, 10:00 o'clock A. M.)

Thursday, August 20, 1942, Court convened at 10:00 o'clock A. M., pursuant to adjournment, and thereupon proceedings were had as follows:

The Court: I think the direct examination of Mr. Vale had been completed.

Mr. Graham: If your Honor please, there are just some exhibits to offer. I now offer Plaintiffs' Exhibit 69 as illustrative of the testimony of the witness Vale, showing drawings of figures 1 and 4 of Lanninger Patent and Defendants' Exhibits 47 and 48 and the relation to Claim 3 thereto.

The Court: All right. They may be received.

Mr. Middleton: Just a moment. If the Court please, there is an objection to the exhibit as to the attempted application to the drawings of Exhibits 47 and 48 of the numerals responding to the numerals shown at Figures 1 and 4 of the Lanninger patent. As to the drawings themselves there is no objection, but the application of the numerals as attempted to be shown on the exhibit is objected to.

Mr. Graham: Then I will ask Mr. Vale, when he takes the stand, to identify the exhibit. Mr. Vale, will you take the stand.

BALDWIN VALE,

a witness produced in behalf of the plaintiffs herein, thereupon resumed the stand and was further [60] examined and testified as follows:

Direct Examination (Continued)

By Mr. Graham:

Q. Mr. Vale, have you examined Plaintiffs' Exhibit 69? A. I have, sir.

Q. Have you read the legend on there purporting to be a copy of Claim 3 of the Lanninger patent in suit? A. Yes, sir.

Q. Is that exhibit illustrative of your testimony that you gave here in this cause? A. I think so.

Q. Is it or is it not? A. It is.

Mr. Graham: The exhibit is offered in evidence formally.

The Court: Now this is merely offered as this witness' comparisons and the enlargement of the figures—what figures are those?

Mr. Graham: Figures 1 and 4.

The Court: —1 and 4 and the references to the claim; is that correct?

Mr. Graham: The references to the claim.

The Court: This is merely what I usually call an illustrative exhibit, the accuracy of which you don't have to concede. It is merely what he thinks the claims as applied to the structure mean. I have had them juxtaposed one upon the other [61] and give me big maps. You don't have to concede the accuracy at all. It is just as an illustration.

(Testimony of Baldwin Vale.)

Mr. Middleton: As an illustration there is no objection.

The Court: All right. It may be received and retain the same number.

(Said drawing of Figures 1 and 4 of Lanninger Patent, etc., above referred to, so offered, having been theretofore marked Plaintiffs' Pre-Trial Exhibit 69, was thereupon received in evidence as Plaintiffs' Exhibit 69.)

Mr. Graham: Plaintiffs offer in evidence Plaintiffs' Exhibit 70, which is a model on your desk, and I will ask the bailiff to hand it to the witness.

Mr. Middleton: To that offer, your Honor, there is no objection.

The Court: That is Exhibit 70?

Mr. Graham: That is 70.

The Court: All right. It may be received.

Q. (By Mr. Graham) Mr. Vale, have you examined Plaintiffs' Exhibit 70? A. I have, sir.

Q. Have you compared it with Figure 1 of the Lanninger patent in suit?

A. Yes, it is in accordance with Figure 1 of the Lanninger patent. [62]

Mr. Graham: The exhibit is offered in evidence formally.

The Court: All right. It may be received.

(Said model of Figure 1 of drawings of Lanninger Patent in suit, so offered, having been theretofore marked Plaintiffs' Pre-Trial Exhibit 70, was thereupon received in evidence as Plaintiffs' Exhibit 70.)

(Testimony of Baldwin Vale.)

Mr. Graham: Plaintiff offers in evidence Defendants' Exhibit 47 which is upon your Honor's desk.

Q. That is an exhibit relative to which you testified yesterday? A. Correct.

Mr. Graham: Your Honor may wonder why we did not show the manufacture and sale by the defendants in this cause of Exhibits 47 and 48, but that is stipulated in the pre-trial order.

The Court: Yes, I understand.

Mr. Graham: Do you desire that we read that stipulation into the record?

The Court: No. The stipulation takes the place of proof. You call my attention to the contents and that is sufficient. A stipulation is part of the proof, so it does not need to be read. The pre-trial order having been signed by the Court, we start from there and any admission there or stipulation, why, has its regular effect.

Mr. Graham: I make this motion for the admission of the exhibit subject to a reservation to the statements of counsel [63] in producing these exhibits wherein he stated that they correspond with Pierce Patent No. 1,945,293.

The Court: Well, I think that is not a part of the stipulation. As I intimated before, I can't see the materiality of the Pierce angle of the lawsuit as yet. Of course, sometimes it is contended in a lawsuit of this character that a certain accused device is constructed according to the teachings of another patent, but that is unimportant. If it infringes it

(Testimony of Baldwin Vale.)

doesn't make any difference what other patent it follows.

Mr. Graham: I merely make the reservation as to the remarks of counsel.

The Court: All right. You don't need to accept any remarks unless it be a stipulation. You may accept only the portion which is offered without modification. All right. It may be received.

Mr. Graham: May this Exhibit 47 be received?

The Court: It will be received in evidence.

(Said model of pipe coupler above referred to, consisting of two parts, so offered, having been theretofore marked Defendants' Pre-Trial Exhibit 47-A and 47-B, was thereupon received in evidence as Plaintiffs' Exhibit 47-A and 47-B, respectively.)

Mr. Graham: On the same basis I offer Defendants' Exhibit 48, about which the witness testified yesterday. [64]

The Court: All right; it may be received.

(Said model of pipe coupling referred to, consisting of three parts, so offered, having been previously marked Defendants' Pre-Trial Exhibit 48-A, 48-B and 48-C, was thereupon received in evidence as Plaintiffs' Exhibit 48-A, 48-B and 48-C, respectively.)

Mr. Graham: I also offer Defendants' Exhibit 8 as being similar to Defendants' Exhibit 47.

The Court: Exhibit 8 is not here in this group, is it?

(Testimony of Baldwin Vale.)

Mr. Graham: I am offering it now.

The Court: Oh, you have it in your hand. All right. Exhibit 8 will be received in evidence.

(The model above referred to, so offered, having been previously marked Defendants' Exhibit 8 in the deposition of Launcelot W. Hanson on file herein, was thereupon marked received as Plaintiffs' Exhibit 8.)

Mr. Graham: I also offer in evidence Defendants' Exhibit 3, which is similar to Defendants' Exhibit 48 which was previously offered.

The Court: All right. It may be received.

(The model above referred to, so offered, having been previously marked Defendants' Exhibit 3 in the deposition of Launcelot W. Hanson on file here- [65] in, was received in evidence as Plaintiffs' Exhibit 3.)

Mr. Graham: I offer in evidence Plaintiffs' Exhibit 96, being page 876 of Knight's American Mechanical Dictionary. As I understand, it is just offered for the convenience of the Court, because I presume it would always be acceptable——

The Court: Is that a publication?

Mr. Graham: That is a standard publication, Knight's Mechanical Dictionary. I offer it, your Honor, for a definition.

The Court: All right. It may be received.

(Photostatic copy of page 876 of Knight's American Mechanical Dictionary, so offered, having been theretofore marked Defendants'

(Testimony of Baldwin Vale.)

Pre-Trial Exhibit 96, was thereupon received in evidence as Plaintiffs' Exhibit 96.)

Mr. Graham: Plaintiff offers as Plaintiffs' Exhibit 17 the commercial device of plaintiff which was to be manufactured and sold under the Lanninger patent, but the defendant reserves the objection that it is not according to the Lanninger patent.

Mr. Middleton: With that reservation, your Honor, there is no objection.

The Court: Well, the reservation is not an objection to the admissibility; merely that you do not concede that it is constructed according to the teachings of the patent. That [66] is all. It may be received.

(The pipe coupling parts above referred to, so offered, having been theretofore marked Plaintiffs' Pre-Trial Exhibit 17, was received in evidence as Plaintiffs' Exhibit 17.)

Mr. Graham: Plaintiff offers as Plaintiffs' Exhibit 59 a drawing of plaintiffs' commercial device of Exhibit 17, subject to the same reservations.

The Court: All right. It may be received.

(Said drawing of longitudinal section and plan view of Exhibit 17, so offered, having been theretofore marked Plaintiffs' Pre-Trial Exhibit 59, was received in evidence as Plaintiffs' Exhibit 59.)

Mr. Graham: That is all. You may cross examine.

(Testimony of Baldwin Vale.)

Cross Examination

By Mr. Middleton:

Q. Mr. Vale, yesterday you discussed the word "hingedly" in your analysis of the patent claims and in your discussion of the physical exhibits. Can you define for us the word "hinge", your conception of the definition?

A. Hinge is a very broad term, and I was guided by Knight's Mechanical Dictionary in what I said yesterday. It varies all the way from the cobweb hinge of a spider clear up to the modern butt hinges. [67]

Q. Do you then say that your definition of a hinge is that embodied in Knight's Mechanical Dictionary?

A. I did not define a hinge yesterday. I defined hingedly.

Q. Yes. I am asking now for your definition of a hinge so that we may reach the other.

A. Well, a hinge is a connection between two bodies movable relative to each other, or one body movable relative to a fixed body, like the jamb of a door. The hinge might be a piece of leather, or it might be a piece of metal; it may be mechanical like a butt hinge. It is still a hinge.

Q Is it your conception of a hinge that the two bodies must be joined permanently by the hinge or is that connection subject to severance in use?

A. That depends on the structure of the hinge. They could be separable.

(Testimony of Baldwin Vale.)

The Court: "Hingedly" would be more like in the manner of a hinge.

Mr. Middleton: That is true, your Honor.

The Court: If you had a piece of leather serving as a hinge, the way they used to do in the old fashioned construction of trunks and household boxes, why, it would bend over. If you make it of metal you have to have a rotator and an axis. If you connect two hose with a string or a metal loop you would have a connection made hingedly, or if you take three loops of wire and attach one to the top of a box and one to the body and connect the two you would have them connected [68] hingedly, although that would not be called a hinge. It serves as a hinge. So I don't think "hingedly" there is synonymous with the adverb or the adjective of the noun "hinge". It would mean more like in the manner of a hinge, so that I think strictly speaking hinges might be hingedly connected, or——

Q. (By Mr. Middleton) Another question along the same line, Mr. Vale. Is it your conception that a hinge operates in one plane or in more than one plane?

A. More than one plane. I would consider my hand were hingedly connected to my arm, capable of movement almost universally.

Q. Then you would say that a hinge might in some instances be synonymous with a universal joint?

A. Well, a universal joint is a broad term also,

(Testimony of Baldwin Vale.)

but a hinge is not necessarily confined to one plane that is hingedly secured.

The Court: In other words, it might be so loose as to turn sideways? A. That is it.

The Court: And the illustration I gave where you had three loops of a chain and attached them to, say, a top of a box, it would move sideways as well as back and forth and up and down.

A. It is a poor hinge, but it is——

The Court: It is a poor hinge, but it is hingedly connected.

A. As it is in Lanninger, it is a poor hinge, but nevertheless the two parts are hingedly connected together with universal [69] movement just like my wrist.

Q. (By Mr. Middleton) Now you referred in your testimony to the word "latch" in connection with Exhibit 47. What definition do you import to the word "latch"?

A. A latch is also a very broad term; in fact, it is generic. It runs all the way from a loop in a rope in which another loop can be secured up to the almost infinite variety of door latches and catches.

Q. Do you say, then, that a latch is also synonymous with a hinge in the ordinary sense in which we are using the word "hinge"?

A. A gate hinge could be used as a latch by removing the pin, disconnecting one part from the other.

(Testimony of Baldwin Vale.)

Q. So that in your mind the difference would be the removal of one part?

A. Well, if you want to separate the parts, but they are hingedly secured in the operative condition.

Q. But as to the latch, your distinction there from the word "hinge" in the broad sense in which we are using it would be that the hinge is connected in some manner and the latch is not necessarily connected; is that true?

A. Well, a hinge is disconnectible if you want to so make it; a latch is disconnectible, and yet they tend in both instances to secure two bodies in a relative condition of security.

Q. But in the instant case you make the words "latch" and the [70] "hinged means" synonymous things?

A. Well, they are equivalent. There is a double link hinge such as his Honor has just described. There is such a variety of hinges and latches that you have a wide choice as to what you use.

Q. But your initial distinction here, if I correctly apprehended, was that the latch does not have a connecting link in and of itself and the hinge does; is that right?

A. No, they both have. They both act in the same relative manner. They both do the same thing at the same time in the same place when in the operative position.

Q. Now then, we referred to the flange here in your discussions yesterday, particularly relative

(Testimony of Baldwin Vale.)

to Exhibit 47, and I wish that you would tell us your conception of a flange.

A. "Flange" again is defined by Knight's Mechanical Dictionary as a very generic or broad term. It runs all the way from rims to ribs.

Q. From what?

A. Rims to ribs. A rib is a flange; a rim is a flange.

Q. Now taking a cross section of gaskets or packing such as we have in these exhibits that you discussed yesterday, would you say, then, from what you have just said about the broad use of the word "flange" that any cross section of such a packing of which the parts were round or oval or any regular geometric form, such as a hexagonal form or square form, or any [71] other regular form, any cross section which had parts in those standard shapes would have upon it a flange?

A. Well, the dictionary defines that even a lineal body may have a flange, like a girder or a rail.

Q. Well, then, looking at the cross section, that would be at one part of the cross section?

A. Well, an angle—what we call in business a shape, a steel shape, or an angle has a flange. Either one of the extensions would be a flange relative to the other.

Q. If I correctly understood you yesterday, you in one instance referred to the free portion of the Lanninger type gasket as a flange.

A. Yes.

(Testimony of Baldwin Vale.)

Q. You were speaking of a flange relative to a true flange extending into a hub, were you not?

A. Well, there was a cylindrical portion that had a flange that extended into a groove in the sleeve.

Q. And if I correctly understood you, you referred in one instance to that cylindrical portion as being a flange?

A. Well, it depends on which is the base. A part extending from another part is probably a flange. You go back to the human body for all of this. There is a flange on the ear that is almost identical with an exhibit here; still it is a flange.

Q. So that in your mind any departure in cross section from a round, oval or other regular geometrical form would constitute [72] a flange to that cross section; is that right?

A. According to the dictionary, yes, for the purpose of securing the other member into operative position; in other words, for anchoring the packing member in the sleeve, the interior groove in the sleeve.

Q. Yes, but any projection from a regular geometric shape would be a flange as to the main body of the geometric shape; is that right?

A. Well, there might be a question of degree there. Just a stud running out from one side, or a bracket, might not necessarily be a flange, because the use of broad terms is sometimes more confusing than variations of the broad term. A part of a flange gives a bracket, for instance,

(Testimony of Baldwin Vale.)

or a segment, or some more doubtful specific word.

Mr. Middleton: May I have the use of the blackboard just a moment, your Honor.

The Court: Yes.

Q. The Lanninger gasket is shaped something like this, granting my inaccuracies in drafting, in cross section; isn't that right (illustrating on blackboard)?

A. Well, very generally speaking, yes. The flange on the Lanninger has a certain taper and it is uniform on opposite sides of the center.

Q. More that way (illustrating)?

A. No. [73]

Q. Well, the general idea that I am attempting to convey is correct?

A. Well, it has a peripheral extension beyond the cylindrical portion.

Q. Now then, getting at the question that I was endeavoring to inquire about here, we take a square packing and we grant that we have on it a projection such as that, looking now at the cross section. That, according to your definition, would be a flange, would it?

A. Which is the packing?

Q. We are just looking now at the square packing in one of the types of gasket. We have round packing and ring packing—

A. Where is the hole?

Q. In this one we are not claiming any hole at all.

A. A flat gasket?

Q. A flat gasket.

A. Yes.

(Testimony of Baldwin Vale.)

Q. And we find that for some mechanical reason there is a little projection like that on it. Is that a flange?

A. That would probably be called a lug or stud or something. It is a segment of a flange, although flanges as a rule do not pass in the same plane; they are a deviation from the plane.

Q. A deviation from the plane?

A. Yes, like the tread of a car wheel has a flange at an angle to the plane of the wheel. [74]

Q. More of that sort?

A. Well, this doesn't look like anything that is in issue here.

Q. No, but I am getting at your definition of a flange. That is all I am interested in.

Mr. Graham: May I interrupt just a moment, Mr. Middleton. I don't think the witness and Mr. Middleton are talking about the same thing, because the square that Mr. Middleton has drawn there has no section lines in it. The witness evidently thinks that that is a plane, where Mr. Middleton means it is a cross section of a square gasket.

Mr. Middleton: Thank you, Mr. Graham.

The Witness: That is what I tried to bring out.

Mr. Middleton: Yes. Does that help?

The Witness: Now that is a ring, is it?

Mr. Middleton: This would be a square packing around the exterior of your coupler.

The Witness: A square in cross section?

(Testimony of Baldwin Vale.)

Mr. Middleton: A square in cross section. That is what I am getting at.

The Witness: O. K.

Q. Would you then call this projection from the cross section a flange?

A. Does that go around? How big is it?

Q. It goes all the way around. [75]

A. Oh, yes. That would be a flange.

Q. If this round ring that we find in one of these exhibits here had extending from it a small projection in cross section that also would be a flange?

A. No, this is contradictory. You just said that that other projection extended down there; a round ring, in other words, with a square cross section. If it is just a little tit sticking out it is not necessarily a flange.

Q. Perhaps I can better illustrate if I may have, Mr. Bailiff, an exhibit lying down there on the bench. We have here this type of packing which is a round ring.

A. Which is a round ring packing; yes.

Q. Which I have endeavored to show a cross section of here, assuming you had that little lug on it projecting out from the ring and going all the way around.

A. Yes, that would probably be a flange. I have to imagine, because that is a very fragmentary part of the whole.

Q. But you would construe that as flange?

A. If it went around the part, yes.

(Testimony of Baldwin Vale.)

Q. Went all the way around and projected out from the ring? A. Yes.

Q. And the same thing with this geometric shape or any geometric shape?

A. Yes, if it extends outward for the purpose of anchoring or fixing the thing in a sleeve I would say that it was a flange. [76]

Q. Is your definition necessarily confined to fixing it in a sleeve?

A. Well, no, if you want to go into abstract matters. I am trying to keep it down here to something that is in issue.

Q. You see, I am referring to a general definition of a flange so that we can then afterwards apply that to the matters in issue.

A. I can't beat the dictionary. That is the closest definition of a flange that I have heard.

Q. Yes, and yesterday you endeavored to define a flange on the packing in Exhibits 47 and 48 as a flange, and in doing that you identified the exterior portion of those packings as a flange.

A. May I look up the exhibit, your Honor?

The Court: Yes.

Q. It was my understanding of your testimony yesterday, Mr. Vale, that you described to the Court the exterior portion of this packing; in fact, all of the packing except the interior sleeve portion as a flange?

A. As a free cylindrical portion having a substantially semi-circular flange. That is a flange, according to the dictionary.

(Testimony of Baldwin Vale.)

Q. And you base your definition of its being a flange on the dictionary?

A. Yes. It performs the same function in the same place and [77] at the same time of anchoring this free cylindrical portion into the groove in the sleeve.

Q. But I say you base your definition on the dictionary definition?

A. I don't want to go beyond that. That satisfies me.

Q. Do you know whether or not, Mr. Vale, in the industry engaged in manufacturing and selling packings such as are exemplified in the exhibits thus far introduced, there is a trade name or designation for the various types of packings we have had before us? A. Oh, yes.

Mr. Graham: I object to the question, if your Honor please, on the ground this man is not qualified as a tradesman in packings.

The Court: Well, it is within the scope of cross examination. If he doesn't know, why, he may state his knowledge does not run to that field.

A. The answer is yes, with the qualification that some of them are arbitrary and some of them are positive misnomers.

Q. (By Mr. Middleton) Do you know whether or not there are in that industry generally accepted trade names and designations for the two types of packing we have had here before us?

A. Well, they all have——

Q. You don't know——

(Testimony of Baldwin Vale.)

A. I know them; and the two packings that have been displayed [78] here in this suit both have flanges. Now there are different shaped flanges on a free cylindrical portion.

Mr. Middleton: Just a moment. I move that the answer be stricken. It is not responsive.

The Court: Yes, that is not responsive. The specific question is—you read it, Mr. Reporter.

(The question was read as requested.)

A. I answered yes, and then qualified it.

Q. (By Mr. Middleton) What are those two trade names or designations, referring now first to the packing shown in Exhibit 70?

A. Exhibit 70?

Q. 70.

A. In this Exhibit 70 we find a packing having a free cylindrical part.

Q. No, the trade name or designation.

A. Well, I would call it a flange packing.

Q. They call it a flange packing?

A. Yes.

Q. Do they also call it a hat packing?

A. Yes. A hat packing is, in a general way, referring to a man's hat, and a derby has a decidedly curled flange as compared with a flat straw hat. So there is a broad term again.

Q. That packing, then, in the trade is designated and known generally as a flange or hat packing; is that right? [79]

A. It is so called, yes. It is a hat without a crown, however.

(Testimony of Baldwin Vale.)

Q. Yes. Now then, referring to the packing shown in Exhibit 47, what is the trade name or designation of that packing?

A. I have never seen this packing in any catalogue except the catalogues that sell this particular line of goods.

Q. You said that you knew the trade names.

A. This generally speaking resembles what they call a U-type, referring to the cross section.

Q. So that its closest resemblance in the trade is to what is known in the trade as a U-type packing; is that right?

A. Well, I would hardly say so, because here is a very thin packing lip with a very thick flange. Now it does not resemble what is called a U-shaped packing in any catalogue that I have seen or in the trade.

Q. Does it resemble more closely what is shown as a flange packing in those same catalogues?

A. That is a matter of expediency in meeting a condition. Yes, they are both flange packings.

Q. I am asking what this most closely resembles as known in the trade?

A. Well, that is a matter of opinion. It is as near one as the other. It is undoubtedly U-shaped in cross section. It is undoubtedly a flange-shaped packing. But it does not look like the flange packing that is used in the trade because of this [80] very thin packing member.

Q. From your experience with these matters

(Testimony of Baldwin Vale.)

would you say that that packing would or would not be known in the trade as a flange packing?

A. Well, as I said, the trade uses many misnomers. This resembles——

Q. Would it or would it not?

A. This resembles what is known in the trade as a U-shaped packing, but it is a very modified U-shaped packing. Usually a U-shaped packing is uniform in cross section.

Q. Does it resemble what in the trade is known as a flange packing?

A. As a flange packing?

Q. Yes.

A. Oh, it is as much a flange as U-shaped.

Q. Referring now to the trade definitions and designations of those two packings.

A. Yes. The word “packing” is broad again. Just a plain cylinder might be a packing and is often a packing.

Q. I am asking from your knowledge now whether this more closely resembles a packing known to the trade as a U packing or the packing known to the trade as a flange or hat packing.

A. To me it looks as much like some hats I have seen as a straw hat with a flat brim or a hat with a curled brim, if you want to go to hats. The cross section of a hard hat, a derby, [81] might look like this.

Q. I will ask the bailiff to hand to the witness Defendants' Pre-Trial Exhibit No. 98, calling the attention of the witness to the cuts shown at page

(Testimony of Baldwin Vale.)

58 of the exhibit. Will you examine that, please, Mr. Vale? A. Yes.

Q. Now you have testified that this packing incident to Exhibits 47 and 48 resembles as much or more the hat packing or flange packing known to the trade as the U-packing. Having reference to the cuts of packing shown on that page, Mr. Vale, have you anything further to add to your description as to the comparison?

A. Well, what I said before, that the U-shaped packing here shown is substantially uniform in cross section in all of its parts.

Q. And because of that fact you feel that the packing incident to 47 and 48 in evidence is just as much like the hat or flange packing as it is like the "U"?

A. If you will notice in the upper right hand corner illustration, marked "Flange or Hat Packing"—

Q. That is right.

A. —that the smaller packing of the two has the flange curled inwardly toward the axis of the packing.

Q. I am asking for the comparison between the gasket in 47 and 48. [82]

A. Very good. Then we find in the upper right hand corner of these illustrations the smaller hat or flange packing has a distinct resemblance to this defendant's gasket because of the curling in of the so-called flange, which in cross section

(Testimony of Baldwin Vale.)

would be very similar to this, a question of degree only.

Q. So that you identify that as closely allied to the idea of the hat or flange packing?

A. Yes. It looks as much like that as it does like the one below with the double annular wall, both of the same thickness.

Q. I will ask the bailiff to hand to the witness Defendants' Pre-Trial Exhibit No. 100, being catalogue of the Anchor Packing Company, and having particular reference to page 397.

Mr. Graham: Mr. Middleton, are you offering these exhibits?

Mr. Middleton: I presume that you want them identified as to origin. I was waiting for that until we have the proper witness on the stand. If you wish to waive the identification as to origin I will offer them now.

Mr. Graham: Yes, I will waive that in order that they may be admitted so that we will know that we are talking about an admitted exhibit.

The Court: All right. Then the previous exhibit may be received.

Mr. Middleton: I will offer both exhibits, your Honor.

Mr. Graham: They are offered for the purpose not of anticipation? [83]

Mr. Middleton: Identification of the types of packings.

(Said catalogue of The Garlock Packing Company, so offered, having been theretofore

(Testimony of Baldwin Vale.)

marked Defendants' Pre-Trial Exhibit 98, was received in evidence as Defendants' Exhibit 98; said catalogue of The Anchor Packing Company, so offered, having been theretofore marked Defendants' Pre-Trial Exhibit 100, was received in evidence as Defendants' Exhibit 100.)

Q. (By Mr. Middleton) Referring now to the cuts shown on page 397, Mr. Vale—

A. Yes, sir; I have it.

Q. Do you find there the same similarity of the packing in Exhibits 47 and 48 and the packing there shown as a flange packing.

A. What I have previously said applies as to these. First comes the U-shaped packing, then the so-called cup packing in the center, and then the flange packing. And I call attention to the so-called cup packing, which has an internal flange just as pronounced as the flange in the identified flange packing. They are both flanges of uniform thickness with the free cylindrical part. One is turned in and one is turned out. They are both flange packings.

Q. In your judgment.

A. Well, it is a physical fact. [84]

Q. Well, but you have said that in the trade these are known by these designations. Is that or isn't it true?

A. Yes, and I also qualified that answer by the fact they are often misnomers. Trade designations are arbitrary. Sometimes they are interfered with

(Testimony of Baldwin Vale.)

by trade marks and they have to have their own particular designations.

Q. In this instance you claim that the trade designation is erroneous as to U-packing?

A. Not in this case. This incidentally is correct, that that is a flange packing just as it says it is. So is the cup packing a flange packing.

Q. I am not asking for your definitions of the instruments provided there. I am asking what the trade name is, as you know it.

A. The book speaks for itself.

Q. Then comparing the book, which speaks for itself, and the physical exhibits here, you still maintain that the packings in Exhibits 47 and 48 correspond more closely to what the book designates as a flange packing than they do to what it designates as a U-packing?

A. I said with qualifications that the U-shaped packing resembles this rubber packing I hold in my hand—what do you call it? Defendants'?

Q. Yes.

A. Defendants'. It also in a sense resembles the cup shaped [85] packing in that you have a free cylindrical part with a flange extending inward, and we just discussed which was the flange—it could be either one. Now if you take the last illustration of flange packing, this is a flange; the fact that it is curled doesn't alter the fact that it is a flange.

Q. And you still say that this, then, looks to you like what the trade calls a flange packing?

(Testimony of Baldwin Vale.)

A. What the trade calls a hat packing.

Q. A hat packing? A. Yes.

Q. Which is synonymous with flange packing in the trade?

A. Well, it doesn't look much like a hat, but it displays something as having a flange extending outward from the so-called crown of a hat.

Q. But to you this gasket from Exhibits 47 and 48 corresponds to what the trade calls a flange or hat packing?

A. This is a mongrel. There is not anything in the trade like it. It combines the characteristics of all of its antecedents.

Q. So you say there isn't any name for that in the trade?

A. Not exactly. Taking a very broad designation, it might be either of the two.

Q. It could be either a flange packing or a U packing?

A. It carries the characteristics of all of them. It has a free cylindrical part and it has a flange. Now the shape of the flange is a matter of meeting a condition. [86]

Q. I will ask you whether or not the illustrations of flange or hat packings as contained in these two exhibits you have last had before you, and the illustrations there of U packings, and the cross sections of both, are in your judgment correct trade name designations for those two types of packing?

A. Well, if I ordered a U packing according to

(Testimony of Baldwin Vale.)

this catalogue and I got this I would certainly be disappointed.

Mr. Middleton: Answer my question, please. Read it to him, Mr. Repoerter.

(Last question read.)

A. I am afraid——

The Court: Read it again.

(Last question re-read.)

A. Why, yes.

Q. Now please hold that question in mind, Mr. Vale, because I want to ask the same question concerning these other catalogues.

A. But in giving such an answer I do not admit that this is a true U-shaped packing in accordance with this catalogue.

Q. I see. A. It is a mongrel.

Mr. Middleton: Will the bailiff please hand the witness Pre-Trial Exhibit 101, purporting to be the catalogue of Belmont Packings and having particular reference to page 52. If the origin may be conceded, Mr. Graham, I will offer Exhibit [87] 101 in evidence.

Mr. Graham: Yes, the origin may be conceded, but its relevancy or materiality is objected to.

The Court: Well, it is merely being used as a basis of cross examination of the witness about his definitions of flange packing. It may be received.

(Said catalogue entitled "Belmont Packings", so offered, having been theretofore

(Testimony of Baldwin Vale.)

marked Defendants' Pre-Trial Exhibit 101, was received in evidence as Defendants' Exhibit 101.)

Q. (By Mr. Middleton) Now referring, Mr. Vale, to the cuts and cross sections—

A. Page 52?

Q. Page 52 of the Belmont Packing catalogues. That is correct, is it not? A. Belmont, yes.

Q. Do those cuts and cross sections and the trade names applied to them correctly represent such trade names as you know them?

A. Yes. I would know what was meant if these names were mentioned.

Mr. Middleton: I will ask the bailiff to hand to the witness Pre-Trial Exhibit 102, and subject to Mr. Graham's admission of the origin I will offer that also as an exhibit.

The Court: It may be received.

Mr. Graham: Yes, the origin is conceded. When I say the [88] origin is conceded I mean—

The Court: The catalogue is that of a concern engaged in this kind of work?

Mr. Graham: Yes.

The Court: He must have robbed all the construction companies of their fancy catalogues.

(Said catalogue entitled "General Rubber & Supply Co.", so offered, having been therefore marked Defendants' Pre-Trial Exhibit 102, was received in evidence as Defendants' Exhibit 102.)

(Testimony of Baldwin Vale.)

Q. (By Mr. Middleton) What is the page there—40? A. Yes.

Q. Referring to those cuts and cross sections on page 40 of Exhibit 102 and the descriptive references as to flange packings and cup packings, are those descriptive references correct as you know the trade names of the articles portrayed?

A. Yes. I may say again that they do not identify the defendant's packing.

Mr. Middleton: I move to strike the further response.

Mr. Graham: I think that is responsive.

The Court: Well, it may be explanatory. I have already let it in as to the others. All right. Let me ask a question. Mr. Vale, on Defendants' Exhibit No. 101, on page 52, you were looking at the blueprint. Now at the bottom of that page are some photographic illustrations of packings. Which one nearest [89] corresponds to the defendant's, in your opinion. I will give you mine in a minute after you have given yours. How about the one on the extreme left?

A. I think that this so-called U-shaped packing would be the closest.

The Court: The closest? A. Yes.

The Court: Except that that is symmetrical and the other is not?

A. There is an annular groove in this. It is not uniform in cross section and would not serve the same purpose.

The Court: All right.

(Testimony of Baldwin Vale.)

Mr. Middleton: I will ask the bailiff to hand to the witness Defendants' Pre-Trial Exhibit 103, being a catalogue of Johns-Manville packings, with particular reference to both pages 26 and 27, and the illustrations of packings and sectional cuts of packings there shown. And at the same time, subject to Mr. Graham's admission of origin, I will offer the exhibit in evidence.

Mr. Graham: Same admission.

The Court: Is that your last one?

Mr. Middleton: I find two or three more here, your Honor, if you would like to see them.

The Court: Well, I was looking at the clock. I think we had better stop with this one and then adjourn. Ask your question as to the one he has in his hand. [90]

(Said catalogue entitled "Johns-Manville Packings", so offered, having been theretofore marked Defendants' Pre-Trial Exhibit 103, was received in evidence as Defendants' Exhibit 103.)

Q. (By Mr. Middleton) The same question as to the preceding exhibit as tendered, Mr. Vale, if you understand it.

A. Well, taking page 27, we find practically the same condition that has gone before in identifying certain types.

Q. And the U and flange packings as identified by those names are the correct designations as you know them in the trade, are they?

A. Yes. The second one at the top—the first

(Testimony of Baldwin Vale.)

two at the top—in fact, the first three at the top are U-shaped packings.

The Court: All right. May I see that now.

Mr. Middleton: If the Court wishes to discontinue we might just stop here.

The Court: All right. The case will be recessed until two o'clock.

(Thereupon a recess was taken until 2:00 o'clock P. M. of the same day, August 20, 1942, at which time Court reconvened and proceedings herein were resumed as follows: [91])

BALDWIN VALE

a witness produced in behalf of the plaintiffs, thereupon resumed the stand and was further examined and testified as follows:

Cross Examination (Continued)

Mr. Middleton: I will ask that the bailiff hand to the witness, your Honor, Pre-Trial Exhibit 104 introduced by the defendants, with particular reference to pages 5, 6 and 8 thereof. In this connection, your Honor, I offer Pre-Trial Exhibit 104 as an exhibit if counsel will admit its authenticity.

The Court: Is that another catalogue?

Mr. Graham: I admit its authenticity but stand on the former objection of relevancy and materiality.

The Court: It will be received.

(Said booklet, entitled "Leather Packings,

(Testimony of Baldwin Vale.)

Alexander Brothers'', so offered, having been theretofore marked Defendants' Pre-Trial Exhibit 104, was received in evidence as Defendants' Exhibit 104.)

Q. (By Mr. Middleton) Referring to page 5, Mr. Vale, of Exhibit 104, I will ask you whether or not you find there a drawing or a cut, sectional cut, of what is known in the packing manufacturing trade as a U packing. A. I do.

Q. And on page 6 do you find a similar drawing and cut delineat- [92] ing what is known in the packing manufacturing trade as a flange or hat packing? A. Yes.

Q. And on page 8 do you find similar drawings and cuts representing what is known in the packing manufacturing trades as a V packing?

A. Vee; yes, sir.

Q. And those cuts and drawings are correct delineations of the instrumentalities known by those names in the trade, are they?

A. Those are the names that those particular types bear in the trade.

Mr. Middleton: Thank you. I will ask that the bailiff hand to the witness Pre-Trial Exhibit 99 introduced by the defendant. I at the same time offer the same in evidence if counsel for the plaintiff admits its origin to be as represented on the exhibit.

Mr. Graham: The same stipulation and the same reservation as previously.

(Testimony of Baldwin Vale.)

The Court: All right. It may be received.

(The form, entitled "The Garlock Packing Company Leather Packing Engineering Data Sheet," so offered, having been theretofore marked in Defendants' Pre-Trial Exhibit 99, was received in evidence as Defendants' Exhibit 99.) [93]

Q. (By Mr. Middleton) Referring now to Exhibit 99, Mr. Vale, an order from of the Garlock Packing Company, do you find there cuts and drawings of U and V flange packings, so designated in each instance, as known in the trade?

A. Correct.

Mr. Middleton: If the bailiff will hand to the witness Pre-Trial Exhibit 97, I offer the same in evidence as an exhibit with the same consent of counsel.

The Court: It may be received.

(The form referred to of Chicago Belting Company, so offered, having been theretofore marked Defendants' Pre-Trial Exhibit 97, was received in evidence as Defendants' Exhibit 97.)

The Court: This one is merely a repetition of what already appears in the Garlock catalogue, isn't it?

Mr. Middleton: Very nearly so, your Honor. I don't think it is identical.

The Court: It is the same Garlock packing. I

(Testimony of Baldwin Vale.)

think this Exhibit 99 is identical with the blueprint on page 52 of Exhibit 101.

Mr. Middleton: If it is identical, your Honor—I haven't checked them closely—I would withdraw it.

The Court: Well, it is perfectly all right, but they are identical except as to the tolerances, and you can see that what they have done—they have even shaded the way they do. [94]

Mr. Middleton: My thought in that connection was that one is an order form to the trade, and the other, of course, the catalogue.

The Court: That is all right. But I wanted to point out that they are the same. There is no deviation between the two.

Q. (By Mr. Middleton) Referring now to Exhibit 97, Mr. Vale, do you find there the same delineations of U and flange packings as have appeared in some of these preceding exhibits?

A. The U and flange packings are shown, yes.

Mr. Middleton: Now before we proceed here, your Honor, we have talked about the origins of these various Exhibits 97 to 104, inclusive, and I would like it understood that when we speak of origins we mean that as to the catalogues that is the catalogue of the company that purports to issue——

The Court: You mean the source of the catalogue, whose it is. That is it.

Mr. Middleton: As to order forms that it is the order form of the company whose name appears

(Testimony of Baldwin Vale.)

on it. We have spoken vaguely of origins, and I just want to be certain that that is complete for the record as we go.

The Court: Oh, I think so. All right.

Mr. Graham: If your Honor please, if I failed to concede the origin of any of those trade catalogues up to this point I will say that I do concede the origin of them, but object to all of them on the ground that they are irrelevant and immaterial.

[95]

The Court: All right. Well, I will overrule that objection. As I stated before, they are proper cross examination of the expert in order to question his definitions he has given of flanges and others.

Q. (By Mr. Middleman) Now Mr. Vale, these names used in the packing manufacturing trade, as delineated in Exhibits 97 to 104, inclusive, the particular names being U packings, V packings and flange packings, are those names old in the packing manufacturing trade? A. Yes.

Q. Do they go back twenty-five years?

A. Oh, I would think so. I am not positive of that.

Q. When we speak of flanges, Mr. Vale, I find a reference in the patent in suit to a vertical flange. I will ask that the bailiff hand to you Exhibit 6. I believe that is Pre-Trial and has not yet been offered. I believe it is on the Judge's bench. I will ask whether or not the model, Pre-Trial Exhibit 6, does or does not disclose a vertical flange.

A. Well, if the axis of the pipe is horizontal

(Testimony of Baldwin Vale.)

then this flange would be vertical; in other words, perpendicular to the axis.

Q. So that is an exemplification of a vertical flange? A. Yes, I think so.

Q. Now if the witness may have Pre-Trial Exhibit 4. Examining Pre-Trial Exhibit 4, Mr. Vale, do you find there an exemplification of a vertical flange? [96]

A. Yes, portions of this are vertical, substantially vertical.

Q. Will you describe for the record the exact manner in which you there find exemplified a vertical flange?

A. Yes. May I use the blackboard, your Honor?

The Court: Yes. Turn it around or erase what you delineated on it before.

A. I would like to show that this defendants' gasket or packing member is none of those identified catalogue pictures and classifications.

Q. Now Mr. Witness, will you please await questions of your counsel on that question. The immediate question is a delineation of where the vertical flange appears in Pre-Trial Exhibit 4.

A. This portion that starts from the larger end of the packing member and starts outward from the axis and then curves to the parting line of the mold, that is substantially vertical. It does have a little curve.

Q. You claim that is a vertical flange the same as the flange on Exhibit 6?

A. Well, not the same, but similar.

(Testimony of Baldwin Vale.)

Q. Yes.

A. Performs the same function.

Q. Yes. And both of those flanges, then, are vertical to the axis of the pipe?

A. With the qualifications that I have put in the answer, it [97] starts off vertical and curves toward the lip of the packing member.

Mr. Middleton: The reference in the patent, your Honor, is line 27, page 1.

The Court: "The very strong vertical flange"—is that the one?

Mr. Middleton: That is right.

The Court: All right. Is there a question pending? No.

The Witness: Well, I did want to illustrate what I mean by——

The Court: I will allow you to explain your answer.

Mr. Middleton: That is, the answer to this question, your Honor; not to the preceding question at this time.

The Court: All right. The witness has a right to do that.

The Witness: I want to show where the flange starts. We start here with a thin lip, and this goes up in an angle, and an angle on this side, and then it bends off here a little bit (indicating). Now so far it is a V. It goes back here past this angle in the V and starts upward. That is where the flange starts. And wherever it passes this line here it is

(Testimony of Baldwin Vale.)

a flange. Now it goes up there following substantially the radius of the curve in the sleeve, and then it takes another radius and meets over here to the V groove in the center. Now it is not a U shape; it is more nearly a V shape, and this part of it is a flange. If you stop there and join this with dotted lines you [98] would have a flange, both sides of it tapering just as it does in Lanninger for the purpose of filling a groove.

Q. Will you draw a large circle to include more than the drawing that you have made there and to include that portion of the drawing that is the flange as you described it?

A. Well, the flange as I described it is where it leaves the plane of the inner portion of the cylindrical portion which, as a matter of fact, should slant down here a little bit more than I have shown it.

Q. Can you just cut off with a circle that will extend outside your drawing that portion that is a flange. Just draw a big circle around it.

A. Oh, you mean in here some place?

Q. That is right.

A. This portion (indicating on blackboard); in fact, the whole thing is a flange, but this is a continuation of the flange.

Q. That portion within the circle is what you primarily refer to as the flange?

A. Yes, sir, because that is an extension past the plane of the packing member; that is, the cylindrical portion.

(Testimony of Baldwin Vale.)

Mr. Graham: That is not what the witness testified, if your Honor please. The witness testified that that portion was the vertical portion of the flange.

The Witness: The whole thing is a flange, but this is the vertical portion from here to there, regardless of its particular [99] cross section.

The Court: Well, let me ask you this question. Bring me my straw hat, will you? I am going to show you a Panama hat, gentlemen, that comes from South America, and ask you if that is what you call a hat flange, or what kind of flange it is, because it is different from American hats. Why do you insist that the flange which is one of those exhibits, Defendants' Exhibit 4, is in reality nearly like Defendants' Exhibit 6, and is a flange rather than what these catalogues seem to call a U packing, limiting the flange to one like a straw hat, an old fashioned straw hat. We used to call them—I forget the old name—why do you do that?

A. Sailor hats, they called them.

The Court: Yes.

A. The point is that every one of those pictures shows a packing with a flange on it. They are all different shaped flanges.

The Court: I will put on this hat. This is a Panama hat and it is turned up, and I have turned it down. It comes from South America. Now what do you call this?

A. That is a flange.

(Testimony of Baldwin Vale.)

The Court: That is a flange. And when it is turned up——

A. That is all right. It is still a flange.

The Court: In other words, if I had it pressed out like this, if I got caught in some Portland rain, why, it would still be a flange? [100]

A. Still be a flange.

The Court: I see.

A. If it is once a flange it is always a flange.

The Court: Always a flange.

Mr. Middleton: That is all.

The Court : Any redirect, Mr. Graham?

Mr. Graham: Yes, if your Honor please.

Redirect Examination

By Mr. Graham:

Q. Will you read into the record, Mr. Vale, Mr. Lanninger's definition of his flange on the elastic packing member.

A. Could we save time by prompting me as to the line there?

Q. Well, page 1, column 1, beginning on line 19 and including line 30.

A. Line 19 begins, "On account of the rigidity of the coupling casing it is however very difficult"—I will correct those errors there, shall I?

The Court: Well, it is evidently a typographical error.

A. I will read it as is: "On account of the rigidity of the coupling casing it is however very difficulty to ensure the lightness of the joint be-

(Testimony of Baldwin Vale.)

tween the cup and the casing." "Difficulty" obviously means "difficult" and "lightness" means "tightness".

Mr. Graham: Continue reading through line 30.

A. I continue to quote: "According to the invention this [101] difficulty is overcome by using the elastic packings through which not only is a tight joint capable of being maintained but a certain degree of flexibility is imparted to the pipe line. The very strong vertical flange on the packing cup permits of a specially simple fixation as it is inserted and clamped in a groove of the coupling sleeve."

Q. Now read further at column 2, lines 60 and 61.

A. Line 60: "The flange b_2 of the packing is held in a recess e . In order to facilitate the tight fitting of the rubber cup on the pipe wall grooves b_1 are arranged in the cylindrical part of the same."

Q. That is sufficient. Will you read lines 85 to 90.

A. Line 85: "The packing b could be adjustably mounted in the casing a as shown in Fig 3. In this case the sleeve and neck are composed of two parts a , a'_1 between the adjacent threaded ends p of which the flange b_2 of the cup shaped packing is clamped."

Q. Now you have already testified that there is rigidity in the casing sleeve. A. Yes.

Q. In Defendants' Exhibits 47 and 48.

A. Yes.

(Testimony of Baldwin Vale.)

Q. And in the elastic packing member of Defendants' Exhibits 47 and 48 is a tight joint capable of being maintained? A. Yes. [102]

A. And is a certain degree of flexibility imparted to the pipe line? A. Yes.

Q. Would you consider the manner of inserting in the packing member in Exhibits 47 and 48 as a specially simple fixation?

A. Well, it conforms to the contour of the groove. The groove is substantially semicircular.

Q. Has it any bolts through it? A. No.

Q. Has it any other means of holding itself in there other than its own resilience?

A. None whatever. It is held in there inherently, and it is further held in there when the pipe is inserted, which makes it impossible to withdraw the packing member.

Q. Now if you wanted a device of the shape and type of the defendants' elastic packing member in Exhibits 47 and 48 would you order a U shaped gasket shown in one of these catalogues?

A. Certainly not. There is nothing like that shown in any catalogue except the catalogue of the manufacturer. This, as I said before, is a mongrel. It is a composite of practically all the packings that are in common practice.

Mr. Graham: Plaintiff offers in evidence Plaintiffs' Exhibit 56, the catalogue of a Mr. Pierce of Eugene, Oregon.

The Court: All right.

Mr. Middleton: No objection. [103]

(Testimony of Baldwin Vale.)

The Court: It may be received.

(The catalogue referred to, entitled "The Pierce Self-Sealing Pipe Coupler", so offered, having been theretofore marked Plaintiffs' Pre-Trial Exhibit 56, was received in evidence as Plaintiffs' Exhibit 56.)

Q. Please refer to page 4, which includes the cover page, page 4 counting from the cover page, and see if you find a gasket disclosed there.

A. I do.

Q. Is it similar to the gasket in Defendants' Exhibits 47 and 48? A. It is.

Q. Is it called in that catalogue a U-shaped gasket or U-shaped packing?

A. At "D" just under the drawing it says "Cup Shaped Groove in Gasket". It doesn't call it a cup gasket. It just says a "cup shaped groove in gasket", which is not true; it is a V-shaped groove.

Q. He calls it a cup shaped groove in the gasket?

A. No, he calls it a cup shaped groove.

Q. Now in the Lanninger patent, referring to Column 1, lines 5 to 8, will you read what Lanninger calls his gasket.

A. "The line consists of pipes which are held together by means of sleeve-like coupling casings with rubber packing [104] cups."

Mr. Graham: That is all.

Mr. Middleton: No questions, your Honor.

(Witness excused.)

Mr. Graham: Plaintiff rests, if your Honor please.

The Court: All right.

GEORGE F. McDOUGALL

was thereupon produced as a witness in behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Middleton:

Q. Will you state your full name, please.

A. George F. McDougall.

Q. What is your present age?

A. I am sixty-eight.

Q. Where is your residence, Mr. McDougall?

A. I live in Portland.

Q. What is your business?

A. I am a professional engineer and patent engineer.

Q. Are you admitted to practice in the United States Patent Office? A. Yes, sir.

Q. Where is your office, Mr. McDougall?

A. At the Board of Trade Building of this city. [105]

Q. Have you testified before in District Courts of the United States in patent matters?

A. Yes, sir.

Q. If you will do so, please, qualify yourself.

A. After the usual preparatory school work I entered the University of Michigan as a candidate

(Testimony of George F. McDougall.)

for the degree of mechanical engineer in 1903. It was the Class of 1907. Leaving the University in 1907 I practiced the profession of mechanical engineer first as an employed person and then later for myself during all of that time.

I am a member of a number of scientific and technical societies as, for example, the American Society of Mechanical Engineers, the American Association for the Advancement of Science, the American Mathematical Society, the Professional Engineers of Oregon, the Oregon Technical Council, and others.

I have done a great deal of writing on technical and scientific matters, particularly with respect to patents, for such publications as the Journal of the Patent Office Society. I have collaborated to some extent with Dr. Emerson Stringham in his books on patent law which are now in the course—there are certain of them published and others in preparation, and particularly his book on Patent Claims. I have lectured before the faculties and engineering classes in universities on mathematics and on patent matters, and I have qualified before various Federal District Courts as an expert in patent matters. [106] I think this will be the eighty-first time if my qualifications are accepted. I am consultant for a large number of firms and corporations, whose names I have not the privilege of mentioning save one,—that is the Oregon State Highway Commission,—on patent matters, and I am now actively practicing the profession as I have outlined it. I

(Testimony of George F. McDougall.)

have taken out thirty-seven patents under my own name, some of which have been profitable and some not. I think that will do for qualifications.

The Court: All right.

Q. (By Mr. Middleton) Mr. Bailiff, please hand to the witness Exhibit 11, being the Lanninger patent in suit. Mr. McDougall, have you previously examined the patent to Karl Lanninger, being the patent in suit in this litigation?

A. I have over a period of years.

Q. Will you kindly analyze that patent for the Court.

A. It is not necessary to read the statement of the invention again. I think it has been done two or three times. But it proposes to use the old bell and spigot joint which originated about one hundred twenty years ago, or such a matter.

Mr. Graham: I object to that, if the Court please, as not explaining the patent.

The Court: Yes, that is the same objection I had to Mr. Vale. That may be eliminated. Go ahead and analyze the patent in the light of what appears on the face of it, not giving any history of the prior art. [107]

A. The patent consists essentially of a bell and spigot joint for pipes in which a flexible packing is substituted for the customary spun yarn and lead. The inventor says "The salient feature of the invention consists in that the coupling sleeves are rigid and have cups of elastic material the neck of each cup fitting tightly on the corresponding pipe

(Testimony of George F. McDougall.)

end, said cups having further each a flange which is clamped in the casing. Only for the reason that they are rigid the coupling casings are capable to withstand the rough handling to which they are submitted". Now I can skip a lot of functions here, and he states: "The very strong vertical flange on the packing cup permits of a specially simple fixation as it is inserted and clamped in a groove of the coupling sleeve." By the way, that distinguishes a packing known as flange packing. A flange packing must always be made rigid at the edge of the flange or over the surface of the flange.

Mr. Graham: I object to that, if your Honor please. That is not in the patent.

The Court: Yes, that is argumentative. That may be stricken out. You had better ask questions. I want him to interpret the patent in the light of the specifications. Go ahead.

A. The flexible packing shown in the drawings, in Figure 1, Figure 3 and Figure 4, is the well known flange packing. The first mentioned figures, 1 and 3, show the flanges clamped by— [108] no, only Figure 3 shows the flange clamped in place by screw threads, which is the customary way of fastening them and is the one described in the specification previously read. And it has one sealing lip which closes against the enclosed free end of the pipe by hydraulic pressure. Hence, the flange is sealed at its edge by one manner of sealing, and at the edge of the contacts of the inserted pipe by another manner of sealing. And then further describing the

(Testimony of George F. McDougall.)

pipe, it is what is described in the patent as a hinged connection and what is referred to in the claim as means hingedly connecting, both of which, to borrow a word from my predecessor on the witness stand, are misnomers. What it really is is a shackle and pin coupling, and it is so known in engineering. In the rigging art, machine designers and everyone else, it is a shackle and pin; sometimes called a clevis. The clevis is shown very clearly straddling the pipe in Figure 2, and it is indicated by the numeral "a₁", and wherein the eye "c" straddled by the shackle "a₁" is indicated by the designation "c₁", and then the cotter pin "d" is placed through the registering holes in the respective parts, and that completes the shackle joint. It has some aspects of a hinge in that it will allow some lateral movement, and perhaps if it is made loose enough it will allow movement all of the way that would be permitted by the lost motion in the coupling where the free end of the pipe enters the coupling shell itself. [109]

Now so much for the description of the pipe that is claimed in Claim 3. Claim 3 starts out: "A pipe joint in connection with pipes one of which has an unthreated end." That is the introductory clause, and I don't know—the Patent Office seldom gives any weight to the introductory clause except as it gives—

Mr. Graham: I object to that, if the Court please.

(Testimony of George F. McDougall.)

The Court: Yes, we can't guess what they do when they allow claims. You see, we take the claim as allowed.

A. All right. The elements of the claim are "A rigid coupling sleeve for coupling said pipes into which said unthreaded end extends, said sleeve having an interior annular groove". Now "annular" means ring-like or ring-shaped, and the groove is further defined in the claim. The groove is located in the inner surface. That locates the groove. Next we have "a packing of elastic material in said coupling sleeve consisting if a free cylindrical part frictionally enclosing the unthreaded pipe end and having a flange". Now a flange is a rib or ridge. It may be circular or it may be as, for instance, a flange on a cylinder, where the cylinder head is bolted on. It may be the flange in a piece of structural steel, such as an I-beam, or it may be where two flanges are made with common edges in the form of an angle iron, or it may be that such a flange forms the base of a T-rail, in which the web and the ball of the rail constitute the balance of the rail. [110] So a flange is always an outstanding part. It may be for strength; it may be for guiding, as the flange on a car wheel; but a flange is a very distinctive thing. It is not a broad designation covering a large number of different shapes. A flange is a flange and is so recognized by engineers when and wherever they see it.

Now the flange is said to be "frictionally retained in the groove of said sleeve". Now have you an

(Testimony of George F. McDougall.)

enlargement of that drawing of the Lanninger patent here? I think it could be explained better, but perhaps I can explain it from this drawing since his Honor has a drawing before him.

The Court: I have a copy of the patent.

The Witness: Now in Figure 3—

Mr. Middleton: Just a moment, Mr. McDougall. I think Exhibit 69 will show the enlargement.

A. Yes. Now the patentee says in Claim 3 that the flange, designated by the letter "e", which here I point to, is frictionally retained in the groove. Now the groove is designated by "b₂". Now "friction" means resistance to motion, and it can be almost zero as in a finely jeweled instrument bearing, or it can be 100 per cent as, for instance, where a wooden handle is driven hard into the eye of a tool. But in this case he says that flange is frictionally retained, from which we must conclude that he means it is retained there immovable against any force that might be used to dislodge it in the [111] ordinary use or operation; consequently, it is sealed there.

One picture of this, Figure 1, shows that the flange is somewhat tapered and evidently it is forced in there something like a cork in a bottle. It would be frictionally retained then in the sense that it was forced in there so tight that any pressure resulting from operation—and it must be remembered that the pressure comes in the opposite direction on top of the cylindrical portion—tends slightly to pull it out. Then that forms a seal for

(Testimony of George F. McDougall.)

the flange at "e", and the other seal is what is called a sealing lip, and that is sealed by hydraulic pressure. Consequently the flange is sealed around its perimeter by means of its engagement with this flange either by the screw thread shown in Figure 3 or by the tapered bottle and cork section like structure shown in Figure 1. So it is sealed at one edge by one means and at the other edge by an entirely different means.

Now the next element we have here is "means for hingedly securing". Now "hingedly", of course, is an adjective, and it is a means for securing said sleeve on the pipe having the unthreaded end. Now "hingedly" probably means "hinged", but as I explained before——

Mr. Graham: I object to his philosophizing as to what is in the patent.

The Court: Well, that may be stricken, the comment on "hingedly." Go ahead. [112]

Mr. Middleton: Just confine yourself more closely to the subject matter.

The Court: Go ahead.

A. Now "means for hingedly securing said sleeve on the pipe having the unthreaded end." Now that is shown as this pin and shackle joint, and it has some movement like a hinge. It also has lost motion in the other direction, and is so designed, as shown in Figure 2, so that it will have lost motion the other way. It is not truly a hinge, because a hinge is a structure providing for movement in a single plane.

(Testimony of George F. McDougall.)

The Court: Well, the adjective is then formed from the past participle of the verb "hinge", "hingedly" meaning it must be a hinge that is solid; that is, so arranged that it moves only in one direction.

The Witness: No, your Honor. It means after the manner of a hinge.

The Court: That is it; like a hinge. If the hinge were loose it might move sideways.

The Witness: It might.

The Court: I see.

The Witness: And then at the same time, your Honor, he did not positively include the word "hinge".

The Court: No. He didn't confine himself to that. He said "hingedly".

The Witness: He means it works something like a hinge, [113] what he says.

The Court: That is what he meant. Of course, the illustration was one embodiment. He protected himself by putting in the usual statement that this is not exclusive. That is just one method, the way he conceives the construction.

The Witness: But he did show an articulating joint.

The Court: Yes.

The Witness: And "means hingedly" would lead me, at least, to conclude that he meant an articulating joint.

The Court: All right.

(Testimony of George F. McDougall.)

The Witness: I think I have answered your question.

Q. (By Mr. Middleton) Now Mr. McDougall, taking up in order the various elements going into the combination claimed, I will inquire first whether or not a pipe joint in connection with pipes one of which has an unthreaded end is new? Did you hear me?

A. No, I didn't hear all of it.

Q. Is a pipe joint in connection with pipes one of which has an unthreaded end a new device in the art?

A. Oh, no. That was many years old before Lanninger entered the field.

Q. Where do you know of an exemplification of that, Mr. McDougall?

A. Well, we found a large number of old patents, the patent of Jones, among others, and I don't remember them by name, it is [114] so long since I looked at them.

Q. I will ask that the bailiff hand to the witness Pre-Trial Exhibit 105. Referring now, Mr. McDougall, to Pre-Trial Exhibit 105 which you hold in your hand—

A. Yes.

Q. —what is the exhibit?

A. The exhibit is a catalogue and really a reference book published in 1901, I think, by the R. D. Wood Company of Philadelphia.

Q. Is that exhibit your property?

A. That book is my property and it has been in my exclusive possession except for use occasionally

(Testimony of George F. McDougall.)

in court like this ever since the year 1901 when I acquired it.

Mr. Graham: If the Court please, I don't object to the authenticity of this, but if it is put in for the purpose of showing anticipation it is not pleaded.

Mr. Middleton: It is for the purpose of showing the state of the prior art, your Honor.

The Court: All right.

Mr. Middleton: I will offer the exhibit in evidence for that purpose.

The Court: All right. What particular page are you referring to?

Mr. Middleton: I will ask the witness to identify his page.

The Court: It may be received. [115]

The Witness: Page 24.

(The book referred to, entitled "Water and Gas Works Appliances and Pumping Machinery, R. D. Wood & Co., Philadelphia," so offered, having been therefore marked Defendants' Pre-Trial Exhibit 105, was received in evidence as Defendants' Exhibit 105.)

Q. (By Mr. Middleton) Referring now to Exhibit 105, Mr. McDougall, does it teach the existence of a pipe joint in connection with pipes one of which has an unthreaded end?

A. Yes. On page 24 of that book there is a cross section of the standard bell and spigot pipe, cast iron pipe, which has an unthreaded end and

(Testimony of George F. McDougall.)

the spigot portion extends into the bell portion, and there is a text there—it is called in the printed title “Bell and Spigot Pipe”. There is a paragraph of text here in description of it. Shall I read that?

Q. You may do so.

A. “The practice of engineers varies greatly both as to depth and form of bell, and various standard designs have been adopted by the water and gas interests in some of our large cities. The following cuts, reduced sections of 12 inch diameter pipes, give with Table No. 2 the form and general dimensions of the bell and spigot pipe.” Now there is earlier in the book, on page 19, what purports to be a general statement of the origin of the bell—wait; I think I have got this correct. [116]

Q. That is sufficient, I think, for the time being Mr. McDougall. Now then, referring to the illustration you have told us about, does that illustration show also a rigid coupling sleeve for coupling said pipes into which the unthreaded end extends?

A. The acoustics are wrong where you sit. I can't hear you nearly as well as when you were—

Q. Does the illustration you have mentioned—is it on page 24? A. Page 24.

Q. —include a rigid coupling sleeve for coupling said pipes into which the unthreaded end extends?

A. It does have that. Those are both present.

Mr. Middleton: Now if the bailiff will kindly hand the witness Pre-Trial Exhibit 32.

(Testimony of George F. McDougall.)

Q. Looking now, Mr. McDougall, at Pre-Trial Exhibit 32, to which is attached 32-A, an enlarged drawing, I will ask you whether or not you find there in combination a pipe joint in connection with pipes one of which has an unthreaded end.

A. That is correct. That is present.

Q. And a rigid coupling sleeve for coupling said pipes into which said unthreaded end extends?

A. Yes, sir; that is there.

Q. Said sleeve having an interior annular groove in the inner surface? [117]

A. The annular groove is present.

Q. Do you find in the drawing of the patent a packing of elastic material in said coupling sleeve?

A. Yes, sir.

Q. Does it consist of a free cylindrical part frictionally enclosing the unthreaded pipe end?

A. It does.

Q. Does it have a flange frictionally retained in the groove of the sleeve?

A. It does have that flange. In fact, it is a replica of the packing used in Lanninger's drawing.

Q. Does it have means for hingedly securing the sleeve on the pipe having the unthreaded end?

A. No, there is no hinged means there. There is means for preventing lateral separation of the pipes under pressure, but they are not in any respect hingedly. It has all of the other elements.

The Middleton: I offer Exhibits 32 and 32-A.

The Court: All right. They may be received.

(Testimony of George F. McDougall.)

(Said copy of Patent No. 580,084, Henry H. Gorter, so offered, having been theretofore marked Defendants' Pre-Trial Exhibit 32, was received in evidence as Defendants' Exhibit 32; said enlarged drawing, H. H. Gorter Patent No. 580,084, so offered, having been theretofore [118] marked Defendant's Pre-Trial Exhibit 32-A, was received in evidence as Defendants' Exhibit 32-A.)

[Printer's Note: Defendants' Exhibit No. 32 is set out in full at page 407 of this printed record.]

Mr. Middleton: I will ask the bailiff to put the drawing on the blackboard there so the witness may point out to the Court the elements he has described.

The Witness: The Court will be able to see that at a glance.

Mr. Middleton: Perhaps the Court would like the advantage of the patent while the witness is making his explanation.

The Court: What?

Mr. Middleton: Would the Court like the advantage of the patent?

The Court: No, no. That is all right. I can see it. I will look at the exhibit when he is through.

The Witness: You can read that like a music master reads a score.

Q. (By Mr. Middleton) If you will, please, Mr. McDougall, point out to the Court the pipe joint in combination with the pipes.

(Testimony of George F. McDougall.)

A. The pipe joint joins the pipe designated by "A" and "B", "B" being the inner one and having an unthreaded end that extends into an enlarged portion of the one designated by "A".

Q. Do you find also an interior annular groove within the sleeve containing the unthreaded end?

A. Yes, I do. That is designated by—I will have to refer to the specifications there, the numerals are so indistinct. I am [119] not certain just which of these numerals is intended to represent the groove, but I think it is the letter "d".

Q. Can you point it out to the Court with the pointer?

A. Yes, right at the right hand side of the drawing. And the packing is designated by the letter "C", and it extends up into the groove. The packing being black, it is quite easy to see where the groove is.

The Court: I will take a look at your paper patent.

The Witness: Yes (handing Defendants' Exhibit 32 to the Court).

Q. (By Mr. Middleton) Now then, the packing you have pointed out to the Court; is that true? Have you pointed out to the Court the packing?

A. Yes, I did. The packing is represented by the letter "C".

Q. Does that packing, Mr. McDougall, have a free cylindrical part?

A. It does. The free cylindrical part tapers down to a point the same as it does in all hydraulic

(Testimony of George F. McDougall.)

packings of that general type—or to an edge, rather.

Q. Is that shown in the drawing as frictionally enclosing the unthreaded pipe end?

A. Yes, it is.

Q. Does that packing have a flange as disclosed by the drawing?

A. Yes. I have already pointed out the flange. It extends up into the groove in a direction normal to the axis of the [120] joint.

Q. Is that flange, Mr. McDougall, vertical to the axis of the packing?

A. It is perpendicular to the axis of the packing.

Q. May “vertical” and “perpendicular” be used synonymously?

A. Vertical means up and down. “Perpendicular” normally is a better word. It means substantially at right angles; it is normal to the axis of the packing.

Mr. Middleton: I will request the bailiff to hand to the witness Pre-Trial Exhibit 40.

The Court: Are these just for the purpose of anticipation or for the purpose of proving the prior art?

Mr. Middleton: These are just for anticipation.

The Court: Both of them?

Mr. Middleton: Yes.

The Court: Both are pleaded in the answer?

Mr. Middleton: Yes.

(Testimony of George F. McDougall.)

The Court: I think while you are looking at them we will have a short recess, gentlemen.

(Short recess.)

Mr. Middleton: Defendants offer in evidence Pre-Trial Exhibit 40, being United States Letters Patent No. 811,812, issued on February 6, 1906, to E. V. Anderson.

(Said copy of Patent 811,812 to E. V. Anderson, so offered, having been theretofore marked Defendants' [121] Pre-Trial Exhibit 40, was received in evidence as Defendants' Exhibit 40.)

[Printer's Note: Defendants' Exhibit No. 40 is set out in full at page 433 of this printed record.]

Mr. Middleton: I will ask the bailiff to hand to the witness Pre-Trial Exhibit 36. I have extra copies of this.

The Court: You say you have extra copies?

Mr. Middleton: Yes.

The Court: Sometimes in our district when we have a lot of prior art they make up what they call a trial judge's book, and they put in all the prior art and index it so I have them before me and don't have to bother with the exhibits.

This is not Anderson. This is Berry you handed me.

Mr. Middleton: Yes. I merely offered Anderson. It is not so important. At this time, your Honor, I offer in evidence Pre-Trial Exhibit 36, being United States Letters Patent No. 1,255,577.

(Testimony of George F. McDougall.)

The Court: That is Berry.

Mr. Middleton: Issued on February 5, 1918, to E. F. Berry.

(Said copy of Patent No. 1,255,577 to E. F. Berry, so offered, having been theretofore marked Defendants' Pre-Trial Exhibit 36, was received in evidence as Defendants' Exhibit 36.)

[Printer's Note: Defendants' Exhibit No. 36 is set out in full at page 413 of this printed record.]

Q. (By Mr. Middleton) Mr. McDougall, looking now at the disclosures of the Berry patent, Exhibit 36, will you state to the Court whether or not you find disclosed in Berry a pipe joint in connection with pipes one of which has an unthreaded [122] end?

A. Yes, we find that in the Berry patent. The pipe joint, I will further explain, is best illustrated—

The Court: Would you mind raising your voice a little? Speak a little louder, please. Go ahead.

A. The Berry patent shows a flexible joint and it also shows a series of them joined together in Figures 1 and 2 to make a flexible pipe, the elements of which are evidently identical. The pipe itself, or the joint itself, rather, is best illustrated, we will say, in Figures 3 or 4.

Q. (By Mr. Middleton) Do you find, Mr. McDougall, in the structure shown in Berry a rigid coupling sleeve?

(Testimony of George F. McDougall.)

A. Yes, there are two rigid coupling sleeves, both alike and both having bells and both having reduced ends, and the reduced end of one is inserted within the bell of the other, and they are interchangeable in that respect.

Q. Now does the unthreaded end of pipe extend into the rigid coupling sleeve?

A. In this particular case there is a flange riveted on the inside of the bell, the outside or flange of which is unthreaded. The reduced portions of both of them are threaded, however, for another purpose. It is for building up the groove to hold the flanged gasket. The pipes are not threaded together, but it does have the flange packing.

Q. Does it have an interior annular groove in the inner surface? [123]

A. It has an annular groove within the bell on the exterior of the reduced portion. It has the same packing that we find in the Lanninger patent except that it has been reversed, you know. It is just turned around. The packing bears against the outside of the flange in the one bell and is held there by hydraulic pressure against the inside of the bell as shown in Figure 4. That is when the pressure is on. And then when the pressure is off it relaxes to the position shown in Figure 3.

Mr. Graham: I move to strike out the answer, if your Honor please, as not responsive to the question. The question included the phraseology was it

(Testimony of George F. McDougall.)

on the interior of the sleeve. The witness did not answer that question.

The Court: Repeat the question, please.

(Last question read.)

The Court: I will strike out the answer. It calls for a specific thing, Mr. McDougall, so you may answer that "yes" or "no".

A. It has an annular groove on the exterior of the reduced portion of the pipe that extends into the bell.

The Court: How is it designated on the drawings, Figure 3 or 4?

A. The annular groove is built up of two portions, "P" and "Q".

The Court: Wait a minute, until I look at it.

A. They are in the form of two annular rings screwed onto the end of that reduced portion. [124]

The Court: Oh, yes; I see them now.

Q. (By Mr. Middleton) But this annular groove, Mr. McDougall, is it on the interior surface of the bell itself?

A. No, it is on the exterior surface of the piece that goes into the bell. They just reverse the application of the same elements that are used in the Laninger patent. It is the same thing and works under the same mechanical principles except that the parts are reversed.

Q. Do you find a packing of elastic material in the coupling sleeve consisting of a free cylindrical part frictionally enclosing the unthreaded pipe end?

A. Yes, that is designated by the letter "R".

(Testimony of George F. McDougall.)

Q. Does that packing have a flange frictionally retained in the groove of the sleeve?

A. It has a flange frictionally retained in the groove, and the flange is designated by the letter "O".

Q. And means for hingedly securing the sleeve on the pipe having the unthreaded end?

A. Well, there is a universal joint there, and I think under the definitions prevailing in this litigation that I could answer that "yes".

Q. Then the difference that you find between this structure and the Lanninger structure is that the groove is on the exterior of the interior pipe?

A. Yes. [125]

Q. Instead of on the interior of the exterior?

A. Yes, that is all the difference.

Mr. Middleton: I will offer Pre-Trial Exhibit 39 in evidence.

The Court: It may be received.

Mr. Middleton: The same being United States Letters Patent No. 1,292,524, issued on January 28, 1919, to L. W. Serrell.

(Said copy of Patent No. 1,292,524 to L. W. Serrell, so offered, having been theretofore marked Defendants' Pre-Trial Exhibit 39, was received in evidence as Defendants' Exhibit 39.)

[Printer's Note: Defendants' Exhibit No. 39 is set out in full at page ⁴²⁹~~401~~ of this printed record.]

Mr. Middleton: Again, your Honor, I have an extra copy.

(Testimony of George F. McDougall.)

The Court: All right.

Q. (By Mr. Middleton) Now referring to Exhibit 39, the patent to Serrell, will you kindly state whether you there find in the disclosures of that patent a pipe joint in connection with pipes one of which has an unthreaded end?

A. Yes. We will consider the bib of the faucet there as a pipe, because that is what it really is. It is a pipe extension of the faucet "a".

Q. Do you find there a rigid coupling sleeve for coupling pipes into which the unthreaded end extends?

A. Yes. That is designated by the numeral "1", the rigid coupling sleeve, and it contains an interior annular groove within which is clampably held the flange of a flanged hat-like packing indicated by the numeral "5" which has a free cylindrical portion [126] "14" which hugs and hydraulically seals the unthreaded end of the pipe to prevent backing up of water through the loose coupling of the sleeve. It does not have a hinged connection, merely having a set screw "6".

The Court: It is not flexible either, is it?

The Witness: Beg pardon?

The Court: It is not flexible, is it?

A. No, it is not shown flexible.

The Court: That is a common device you use where you have an old fashioned house which has a tub and you would like a shower, you tie that on, and then go to the five and ten cent store and buy

(Testimony of George F. McDougall.)

one of those little hoses there and tie them up, and there you are fixed. Isn't that what that is?

A. That is what it is, for attaching a hose to a faucet. But it shows exactly the same type of hydraulic seal that is used in the Lanninger drawings, and the flexibility evidently was not needed there if they were going to put a hose on right there.

The Court: This device does not intend to tie two pipes together. It is merely what you call a reducer, what you call in plumbing a reducer, to which you can attach a hose. Isn't that what it is?

A. It is for using a hose, but quite evidently a pipe could be attached just as well.

The Court: For what purpose? [127]

A. Well, for any purpose of conducting water.

The Court: I see.

A. The sealing principle is the same.

The Court: All right.

Mr. Middleton: I will ask the bailiff to hand to the witness Pre-Trial Exhibit No. 27, and before it goes to the witness, your Honor, I will offer that exhibit in evidence.

The Court: All right. It may be received.

Mr. Middleton: The same being Letters Patent United States No. 999,169, granted on July 25, 1911, to Theodore N. Jones.

(Said copy of Patent No. 999,169 to Theodore N. Jones, so offered, having been theretofore marked Defendants' Pre-Trial Exhibit 27, was received in evidence as Defendants' Exhibit 27.)

(Testimony of George F. McDougall.)

[Printer's Note: Defendants' Exhibit No. 27 is set out in full at page 395 of this printed record.]

Mr. Middleton: I have an extra copy of that, your Honor.

Q. Now is the Jones patent, Exhibit 27, Mr. McDougall, the disclosure of a means of coupling pipes?

A. It is a means of coupling pipes, yes, or hoses or coupling water conduits.

Mr. Graham: I object, if your Honor please, to the witness answering in that manner. I think the question is perfectly capable of having a "yes" or "no" answer and then explaining it.

The Court: Well, he answered it hoses or pipes.

Mr. Graham: One or the other. I want to know which it is, if I may. [128]

The Court: Well, in the face of this it is for hose couplings.

Q. (By Mr. Middleton) The title of the patent speaking for itself has "Hose-coupling", hasn't it?

A. Yes, hose-coupling.

Q. May it as well be used for coupling pipes?

A. Yes, it might as well be used for coupling pipes.

Q. Mr. McDougall, do you find in the disclosures of the Jones patent a pipe joint in connection with pipes one of which has an unthreaded end?

A. Yes, sir.

Q. A rigid coupling sleeve for coupling pipes into which said unthreaded end extends?

(Testimony of George F. McDougall.)

A. Yes, sir; that is present.

Q. Said sleeve having an interior annular groove in the inner surface?

A. Yes, sir; it is provided with an annular groove in the inner surface.

The Court: Where is that? Where do you find that?

A. That annular groove in the inner surface is designated by the number—the flange of the packing that extends into it is designated by the numeral “22” in Figure 2, and the groove there—I find no designating numeral on it, but it is a space at the end of the interior thread on that sleeve and between that and the nut “18” that screws in there. The flange of the packing is inserted in there and evidently clamped by screwing [129] the plug “18” up against it.

Q. (By Mr. Middleton) A packing of elastic material in the coupling sleeve consisting of a free cylindrical part frictionally enclosing the unthreaded pipe end?

A. Yes, there is a flange type packing in there.

Q. Does it enclose the unthreaded pipe end?

A. No, it extends into it.

Q. Does that packing have a flange frictionally retained in the groove of the sleeve?

A. It does.

Q. Is there shown means for hingedly securing the sleeve on the pipe having the unthreaded end?

A. There is a latch there that prevents the pipe

(Testimony of George F. McDougall.)

from blowing apart, and it hooks over a keeper made rigid with the unthreaded part.

Mr. Middleton: I will request the bailiff to hand to the witness Pre-Trial Exhibit 52.

The Witness: I now have Defendants' Exhibit marked 52, and the parts of it are marked 52-B and 52-C, which is made according to the disclosure of the Jones patent.

Mr. Graham: I have an objection to that if it is offered.

The Court: Well, it has got to be offered if he is going to testify about it. Is this a model that you made?

A. I didn't make it, no. I don't know who made it.

Mr. Middleton: I am going to offer the exhibit, your Honor. [130]

The Court: Well, of course he can't testify and describe it before you offer it.

Mr. Middleton: Beg pardon?

The Court: He can't testify and describe it before you offer it if counsel has objection.

Mr. Middleton: I will at this time offer the exhibit in evidence, your Honor.

Mr. Graham: I make objection to the exhibit on the ground that is not a model of the Jones patent.

Mr. Middleton: I believe counsel should specify the point of the objection.

The Court: Well, I presume the point of the objection is a very general rule that you can take things from one art into another and be in the realm

(Testimony of George F. McDougall.)

of invention. In other words, coupling for hose is not coupling for pipes to make them rigid, and that is a very well known principle. In one of my recent opinions I referred to that fact, that going from one art to another may involve invention. You can't take a coupling and manufacture it into something else and then claim this has destroyed the patent.

Mr. Middleton: I believe, your Honor, that I have authority here that where the other art is an analogous art——

The Court: Coupling hose is not an analogous art to coupling rigid pipe to be used in irrigation. Coupling hose means coupling rubber hose. I have studied that question but re- [131] cently. I don't know which opinions they are; I haven't got an index to all my opinions, but I can find it very quickly, where that very point was made. I have had them go back to carriage wheels in trying to destroy a very valuable invention.

Mr. Middleton: I am free to concede that if the art were a strange one the rule would not apply, but if it is analogous——

The Court: Well, there is no analogy between coupling hose and coupling pipe. Furthermore, the man did not claim an application to anything else but the realm of hose. You can't construct a model which is not within the contemplation of that and apply it. I will sustain the objection at the present time. If you can show me an authority that you can transpose one art into another where the man claims a right to connect—he has even used male and

(Testimony of George F. McDougall.)

female members, which is the ordinary way of coupling hoses. I have never seen this, but you go down to the five and ten cent store, if you have ever done any gardening and burst a hose, and you buy those little yellow things which you use inside of your hose, and you stick one in one way and the other the other way and then connect them, and your hose is just as good as new. You can't claim that to be anticipation of this art. If you discover any authorities tomorrow you may renew the offer, but at the present time I am not going to go outside of the art itself, and that is [133] coupling pipe and not coupling hose. It is an entirely different art, an entirely different purpose. Hose are generally small and made of fiber or rubber or some such flexible material, which has flexibility in itself, and may be connected for various purposes. The object is entirely different, and the mere fact that it reads on the present patent shows the absurdity of trying to solve problems by merely reading the claims upon a structure. That is why the justices of our Circuit Court have said in itself it means absolutely nothing. As I said, I have seen claims read upon structures that were as foreign as any could be. Furthermore, there is no showing here that this was ever reduced to practice; furthermore, no foundation has been laid for this in the first place. You would have to show that somebody constructed it and that he constructed it according to the teaching of this. But laying that aside, I think

(Testimony of George F. McDougall.)

it is entirely foreign to the art, so for the present I will sustain the objection.

Mr. Graham: I have another objection to it, if your Honor please, on that very ground, in case Mr. Middleton should convince you with authorities, and that is that it is not according to the Jones patent structurally inasmuch as the Jones patent shows a tight sleeve joint with no flexibility between the sleeve and the unthreaded pipe end, whereas this model has been made with a great deal of flexibility.

The Court: Well, of course that would go merely to the cor- [134] rectness of the model. The thing I am concerned with, this is an entirely foreign copy.

Mr. Graham: Yes, I raise that too.

The Court: At the present time I will sustain the objection. However, I will allow counsel to show me authorities to the contrary, to show the similarity between this art and another.

Mr. Middleton: My point, your Honor, was not that I had checked authorities that hose coupling was like pipe coupling, but merely that in an analogous art—

The Court: This is not an analogous art, because otherwise [135] you could resort to all sorts of couplings. The art here is coupling pipe, rigid pipe, used for irrigation purposes, and only pipe couplings are germane; not hose couplings, or anything like that, because hose couplings are entirely different. You have a flexible pipe and a rigid connection.

(Testimony of George F. McDougall.)

Mr. Middleton: I didn't mean to tell the Court that I had authority that a hose was like a pipe.

The Court: No, no. I didn't mean that, but your authority that you can use one from the other. I don't think it is the same field. You must consider what we are dealing with. Pipe has been invented for thousands of years. Pipe has existed because irrigation has existed for many years, and transporting water through pipes of some kind or another is as old as the mechanical arts are, since men began to live together and had to transport water from one direction to another. The novelty that is claimed here lies in providing a method of a loose connection which gives you a flexible joint, so where you had rigid pieces of pipe you would have an element of flexibility which would enable you to move them about or put them on a hillside or put them in all directions. Therefore, we are limited to that art. Otherwise all sorts of couplings might come in. And it doesn't really help very much, you know, because ultimately you can go—every patent attorney has an index of all the patents ever issued, and all he has to do is to go back and find similar things. I have had as many as fifty thrown at [136] me in one lawsuit. But ultimately the real help comes from finding references that are as nearly as they could possibly be in the same art. Frankly, although no objection was made, I can't even see the connection of a stationary faucet introducing a reducer—that is all it is; that other patent, Exhibit 36, is merely what is used in plumbing. I haven't done any plumb-

(Testimony of George F. McDougall.)

ing, but I have been a judge of the District Court long enough, and in a district which has a lot of litigation, to handle almost everything in the catalogue of mechanical arts. And in ordinary plumbing if you have a half inch hose and you want to tie it to a quarter inch hose you introduce a coupling which is known as a reducer, and then you can attach a piece of pipe smaller in diameter. That is all this hose connection is. It is a reducer that will reduce the ordinary spout of a bathtub by giving you a corrugated point into which you can stick a piece of hose made for the purpose, on the end of which there is a sieve-like container through which the water will spout and give you the effect that you have in a shower by sitting down in the tub. I can't see that even that can be said to be a kindred art. That is an entirely different art. We are dealing with a stationary object.

Mr. Graham: I may say, if your Honor please, the reason I did not object to that other one was because I felt that I would have to wait until I had a right to cross examine to show what is in the description. [137]

The Court: That is perfectly all right. I want to have an understanding that in a case of this character my conception of the similarity of the art is that we will have to be confined to rigid pipe, an attempt to connect them by making them flexible, and that examples from any other art such as connecting hoses made of rubber or fiber do not help at all because the art is not the same and the thing

(Testimony of George F. McDougall.)

to be achieved is not the same. So that is the way the record stands at the present time. Let's go on to something else.

Mr. Middleton: In that case, your Honor, I will withhold the offering of some of these patents cited in the prior art, even though they disclose some of the features of the Lanninger patent.

The Court: The Supreme Court in a very famous case has said that when you find a combination, in order to successfully plead anticipation or in order to urge that there is no invention under the prior art merely because the art was in such state that whatever new elements were added by the inventor anyone skilled in the art could have thought of, you cannot defeat one combination by taking one element or two of them and showing that they were in patents such and such and another one in another one. The Supreme Court has specifically held that cannot be done, because that is unfair to the inventor. What you have to show is that the elements or equivalents which were in this very combination existed in the prior art; not [138] scattered through eight or ten patents, but in one patent.

Mr. Middleton: However, if all of the elements of the combination are old and only the combination itself is new, that fact may tend to restrict the application of the doctrine of equivalents.

The Court: Well, that merely gives you a narrow construction. [139]

Mr. Middleton: I think in the light of the Court's

(Testimony of George F. McDougall.)
ruling I had best wait until morning before proceeding with that.

The Court: I think that is all right. [141]

But I think a patent like Jones is a fair reference—not Jones; I mean Berry; Berry, especially, Gorter and Berry. I am not saying that they are decisive references, but they are good references, references which really show some similarity, either in the component parts or in the functional effect. But aside from the point I raised where I don't think they are analogous, I also feel it is not helpful to the Court, when you can show better references, to present a lot of them which are far fetched. [142]

Mr. Middleton: I think for this evening, then, we will confine ourselves——

The Court: You haven't any others, I mean other than those you are speaking of?

Mr. Middleton: I will sort over the prior art tonight and try to condense it so that we can use less time in the morning on it.

The Court: All right. I think you had better do that. I will be glad to adjourn at the present time. I don't think we will be interrupted tomorrow.

Mr. Middleton: I could continue with the witness on other matters if the Court wishes to continue.

The Court: Well, you may go on until five o'clock if you have other matters.

Mr. Middleton: If the bailiff will hand to the witness Exhibits 47 and 48.

Q. Now referring to Exhibit 47, Mr. McDougall, do you find in that structure of the exhibit a pipe

(Testimony of George F. McDougall.)

joint in connection with pipes one of which has an unthreaded end? A. It is present.

Q. A rigid coupling sleeve for coupling said pipes into which said unthreaded end extends?

A. That is present also.

Q. Will you indicate it, please, or describe it.

A. The rigid coupling sleeve is marked 49-B and the one with the [143] unthreaded end is——

Mr. Middleton: I will correct you, Mr. McDougall. That is 47.

The Witness: 47-B, yes; and the one with the unthreaded end is marked 47-A.

The Court: No, what is called 47-B is now 48. 47-A is 47.

The Witness: Oh, no. 47-A is 47. It is not 48.

Mr. Middleton: The initial designations on these exhibits, your Honor, are 47-A for one end and 47-B for the other end. There are several that are marked that way. One end is "A" and the other is "B".

The Court: Oh, is that it?

Q. (By Mr. Middleton) Does that sleeve have an interior annular groove?

A. Interior annular groove?

Q. In the inner surface?

A. No, it does not. It has a bell end with a half round groove in it.

Q. A bell end with a half round groove?

A. A bell end with a half round groove. It is not the type of annular groove described and shown in the Lanninger patent at all.

(Testimony of George F. McDougall.)

Q. Now does this exhibit contain a packing of elastic material in the coupling sleeve?

A. It does. [144]

Q. Does that consist of a free cylindrical part frictionally enclosing the unthreaded pipe end?

A. Yes, it does have that.

Q. And does it also have a flange frictionally retained in the groove of the sleeve?

A. It does not. What it has is a V-section packing, which is in principle exactly the same thing as a U-section packing. I have heard a lot of argument about this packing—

Q. Well, let's take that slowly, Mr. McDougall.

The Witness: Can I describe this packing?

Q. Well, just a minute. We will get to that. Does this structure have means for hingedly securing the sleeve on the pipe having the unthreaded end?

A. It does not. It has at bayonet joint for connecting them together.

A. It does not. It has a bayonet joint for connecting to the structure leave room for a hinged motion?

A. It leaves room for universal motion to the full extent of the lost motion between the outside of the unthreaded pipe and the inside of the bell save as it would naturally be restricted by the presence of the gasket in that half round groove.

Q. Now before we come to the gasket or packing, Mr. McDougall, I will ask you whether or not you know the trade names or designations as employed in the industry making and selling packings.

(Testimony of George F. McDougall.)

A. I do. I have known them for many years.

[145]

Q. Applicable to packings such as that you have in your hand? A. Yes.

Q. And to such packings as are exemplified by Exhibit 6?

A. Yes. I have been thoroughly familiar with them for many years.

Q. What names in the trade are applied as descriptive and as designating gaskets or packings formed to the shape of Exhibit 6?

A. That is what is known as a flange packing or a hat packing.

Q. What name in the trade is applied as descriptive of and as designating packings formed to the model and shape of the packing you have removed from Exhibit 47 and the similar Exhibit 4?

A. That is what is known as a V-section packing, which is in principle exactly similar to a U-section packing.

Q. And you say that the correct trade name designation is a V-section packing?

A. This is a V-section packing, but the principle of its operation is precisely the same as a U-section packing. They make a V-section packing because they will go in a little smaller space than the ordinary U-section packing. It is merely a matter of choice.

Q. Now Mr. McDougall, does the flange packing and the U or V-section packing operate functionally in the same manner? A. They do not.

(Testimony of George F. McDougall.)

Q. Will you explain to the Court the difference in functional operation of the two kinds of packing, the V or U on one side and [146] the flange on the other?

A. A V-section packing—or the flange packing, rather, is illustrated on the blackboard in Gorter Patent No. 580,084. It has a flange which is sealed or held in position by mechanical means. Now in the Lanninger patent that is described as frictionally retained. Grippingly retained might be a better name, but we will just take it frictionally retained, as it is not misleading. Now that outside edge is sealed off against leakage by either forcing or clamping it into that annular groove.

Q. Now we are speaking of flange packing, are we?

A. I am speaking of flange packing.

Q. Then please illustrate with a flange packing in connection with this other one.

A. The flange of a flange packing is always mechanically sealed as contradistinguished from hydro-mechanically sealed. It is mechanically sealed either by forcing it into a groove, like you force a cork into a bottle or something like that, or by clamping it so that mechanical force independent of hydraulic pressure seals that edge of it. Then the inner edge has a sealing lip, and that is forced against the pipe or article that it surrounds, and that is sealed hydraulically. The harder the hydraulic pressure there the tighter the seal. Now that is not true with the flange at the edge. Being mechanically

(Testimony of George F. McDougall.)

sealed it can be overcome by hydraulic pressure to an excessive amount, but the two sealings are absolutely independent. [147]

Q. You would say, then, that in the flange packing there is a mechanical sealing of the flange?

A. Mechanical sealing of the flange, and the hydraulic pressure sealing of the pressure lip, and that is independent of whether pressure comes from the inside of the lip and forces it out or on the outside of the lip and forces it against the pipe. Now then, irrespective of the asymmetrical section of the U-shaped or V-shaped section packings, whether one leg is longer or shorter than the other, whether one is thick or thin, the principle remains the same. It has two sealing lips, and it is held in place usually expansively; not frictionally, but it expands into place as a piston ring does when you are fitting it to a cylinder. You lay it in the cylinder and it expands in the cylinder and it is held there by its own expansion. If you cut a section out of it and lay it into the same groove it will fall out by its own weight, so it is not frictionally held in the way that is described and meant in the Lanninger patent.

Q. How does it act? What is its function in use?

A. Well, when the coupling is dormant, the pipes are we will say laid and are empty, the packing lies in place there and merely occupies its position. If it is well designed its resiliency holds it so that its edges are practically in contact with those surfaces against which it will seal by internal pressure. When water comes through the pipe and pressure appears

(Testimony of George F. McDougall.)

one lip is [148] pushed inwardly; that is, the cylindrical portion is pushed inwardly tightly against the pipe, and the other one is pushed outwardly tightly against the inside of the bell. And it has this difference in operation; that no matter how high the pipe pressure becomes, the hydraulic pressure becomes, inside of the pipe the seal is tight in proportion until you reach the point of destruction where something carries away, because the higher the pressure the tighter the seal. There is that distinguishing feature between the V and U section packings and the flange packing; that one can never be mistaken for the other if you consider that the U and V section packing has two sealing lips which seal oppositely from internal pressure spreading them apart.

Q. Does it then have any mechanical sealing action? A. It has no mechanical sealing.

The Court: We will adjourn until ten o'clock tomorrow, gentlemen.

(Thereupon an adjournment was taken until tomorrow, Friday, August 21st, 1942, at 10:00 o'clock A. M.) [149]

Friday, August 21st, 1942, at 10:00 o'clock A. M. Court reconvened pursuant to adjournment and proceedings herein were resumed as follows:

Mr. Middleton: If the Court please, at this time I believe it would be well to offer in evidence certain of the exhibits not yet offered so that we may have them before us as we proceed. At this time I offer in evidence Pre-Trial Exhibit 2, being a model of

coupler similar to those made in commercial use by the plaintiff in this cause.

Mr. Graham: No objection.

(Said model of coupler, so offered, having been theretofore marked Plaintiffs' Pre-Trial Exhibit 2, was received in evidence as Defendants' Exhibit 2.)

Mr. Middleton: Defendants also offer in evidence Defendants' Pre-Trial Exhibit 4, being a packing.

The Court: It may be received.

Mr. Graham: No objection.

The Court: All right. It may be received.

(Said model of packing, so offered, having been theretofore marked Defendants' Pre-Trial Exhibit 4, was received in evidence as Defendants' Exhibit 4.)

Mr. Middleton: The defendants also offer in evidence Defend- [150] ants' Pre-Trial Exhibit 6, being a packing.

(Said model of packing, so offered, having been theretofore marked Defendants' Pre-Trial Exhibit 6, was received in evidence as Defendants' Exhibit 6.)

Mr. Middleton: The defendants also offer in evidence Pre-Trial Exhibit 22, being a printed copy of United States Letters Patent No. 1,945,293, issued on January 30, 1934, to R. H. Pierce.

The Court: Is that one of the anticipation patents, or is that offered merely on the prior art?

Mr. Graham: If the Court please, that is a patent not in the prior art. It is some years later than the patent in suit.

The Court: Oh, yes; subsequent to it.

Mr. Graham: It is objected to, therefore, as irrelevant and immaterial to the issues in the case.

The Court: Let me take a look at it. There was something said in the opening statement about the Pierce device, but at the present time I can't see any materiality of a device patented subsequently. As I said before, the mere fact that the defendants claim that they are manufacturing according to another device is not material if, in fact, they are infringing the patent of the plaintiff.

Mr. Middleton: The point would be, your Honor, that we at least import a patentable difference; not necessarily nega- [151] tiving infringement, but importing a patentable difference.

The Court: How could a subsequent patent to another person explain a prior patent or affect litigation over a patent filed ten years before? Let's say the patent in suit was applied for in 1923. His patent was applied for in 1931, and that is eight years afterwards. The patent in suit was granted as of February 18, 1930 and the Pierce patent was not granted until January 30, 1934.

Mr. Middleton: I would be quite free to say, your Honor, that it has little bearing, but it does import a patentable difference for whatever that implication is worth.

The Court: I don't know that it is worth anything. I don't see any patentable difference. A subsequent patent by the Patent Office where they might have seen a deviation does not explain a previous patent that they have issued to somebody else. They may have been right in the first place and wrong the second, or vice versa. The mere fact they found a patentable difference does not mean anything. They have found a lot of patentable differences. In the last ten years fifteen straight patents have been invalidated by the Supreme Court, and just the other day, just to break the monotony, they actually sustained a patent. It is the first time they have done it in ten years. Every patent that has gone before them in the last ten years has been declared invalid for want of invention. [152]

Mr. Middleton: It is fair to the Court to say in connection with this that I also propose to offer, if this is admitted, the Gheen patent, which covers one of these locks which is claimed as an infringement, and the Folsom patent, which covers the other lock which is claimed as infringing the Letters Patent in suit, just as Pierce is.

The Court: The mere fact a patent has been issued on one of the elements of a combination would not be material. If that is your object, I will sustain the objection. The objection will be sustained to Exhibit 22 on the ground it has no bearing on the subject. All we are interested in here is one problem as to the patentability, and the second one is the infringement. As I said yesterday,

the infringement is determined not so much by a comparison of the devices but a comparison of the accused device with the teachings of the patent in suit, with the claims. [153]

Mr. Middleton: In that case, your Honor, I will postpone offering Pre-Trial Exhibit 23, copy of United States Letters Patent to Rolfe A. Folsom, and Pre-Trial Exhibit 83, copy of [157] United States Letters Patent to R. L. Gheen, the two patents covering two locking devices shown on Exhibits 47 and 48.

The Court: All right.

Mr. Middleton: The defendants now offer in evidence Pre-Trial Exhibit No. 45, being a certified copy of the File Wrapper and Contents of the patent in suit.

The Court: All right. The file wrapper will be received.

(Said certified copy of File Wrapper and Contents in re Patent 1,747,942, so offered, having been theretofore marked Defendants' Pre-Trial Exhibit 45, was received in evidence as Defendants' Exhibit 45.)

GEORGE F. McDOUGALL,

a witness produced in behalf of the defendants, thereupon resumed the stand and was further examined and testified as follows:

(Testimony of George F. McDougall.)

Direct Examination (Continued)

Mr. Middleton: Now when we closed last evening we were discussing the operation and use of the gasket or packing employed in Exhibits 47 and 48. Will the reporter be good enough to read the last question and answer.

(The record was read as requested.)

Q. (By Mr. Middleton) Now in behalf of the plaintiff, Mr. McDougall, it has been testified that the flange form of packing is wedged in the groove, and that the action of wedging is fric- [158] tional in the groove. Do you understand that?

A. Not so clearly. I think I understood it, but I must be sure.

(Last question read.)

The Court: You haven't finished. You are just making a statement. That is why he doesn't get it.

Mr. Middleton: Yes.

The Court: You haven't propounded a question to him on the basis of that.

Q. (By Mr. Middleton) Does that wedging action that the plaintiff's device secures in relation to the flange packing occur in relation to the packing used in connection with Exhibits 47 and 48?

A. No, sir; it does not.

Mr. Middleton: I will ask that the bailiff hand to the witness Pre-Trial Exhibit 81-B, and I will offer 81-B in evidence, your Honor.

The Court: It may be received.

(Testimony of George F. McDougall.)

(The model so offered, having been theretofore marked Defendants' Pre-Trial Exhibit 81-B, was thereupon marked received as Defendants' Exhibit 81-B.)

Q. (By Mr. Middleton) What is Exhibit 81-B, Mr. McDougall?

Mr. Graham: May I interrupt? In the pre-trial that was offered as an exemplification of the Pierce patent, which his Honor has held to be irrelevant and immaterial and has not admitted. Now are you introducing that still as a model of the Pierce patent?

[159]

Mr. Middleton: Well, I will now identify the structure as the same thing as Exhibit 47 and 48, less the lock, or attempt so to do, at least.

Q. I will ask you, Mr. McDougall, whether Exhibit 81 is a counterpart of Exhibits 47 and 48 excepting that it does not include the locks?

A. That is true; it is. The gaskets are interchangeable.

Q. And this exhibit has a section cut from it, has it?

A. It has a section cut from the bell of the hub.

Q. Now can you show to the Court through the use of Exhibit 81-B what you mean by the lack of frictional engagement of the gasket in the bell or groove?

A. Yes. Now the bell has been sectioned and also the gasket has had a piece removed from it. It is held expansively in place, but not so much, your

(Testimony of George F. McDougall.)

Honor, as if it was a full gasket. Now have you the other piece, counsel, of this?

Mr. Middleton: I have a piece here, although it is not offered as a part of the pre-trial exhibit.

A. Now I remove this main portion of the gasket or packing, and I lay this piece that has been removed up into the groove and I will compress it there with my fingers as vigorously as possible. If I remove my support it falls by its own weight; no friction there at all. But when the packing is put in there the packing is inherently expansive, and it is of course more so when the piece is in it, but it is not frictionally held. It [160] is held by its own inherent resilience. I will now remove the gasket from Exhibit 47 and use it in this section piece, removing the broken or cut gasket and put this one in in its place, and now it stands out firmly in much the same way that it would if the section had not been removed. And then when I insert the unthreaded end it is easy to see precisely what happens. It also illustrates the fact that the sealing is by hydraulic pressure against this thin lip here, and also by hydraulic pressure against the inside of the bell of the opposite lip. The pressure tends to spread this V apart, and the sealing effect is produced solely by hydraulic pressure; it has nothing to do with the fit of any flange in the groove held there frictionally or by any other mechanical means. So that was what I was trying to explain, that the distinction is always unmistakable between a packing having this principle of operation—either a U or V section—is that one edge is sealed

(Testimony of George F. McDougall.)

outwardly against the surface as here, and the other edge is sealed inwardly as against this pipe, and the sealing then is automatic and it is always in proportion to the pressure. The heavier the hydraulic pressure the tighter the seal.

The Court: So you would get a better seal through this method by using what you call a V-shaped sealing than by using the other one, the hat-shaped or the flange?

A. It has numerous advantages. In the first place, the seal is always going to be adequate. I have questioned the efficacy [161] or effectiveness of the seal where the flange is merely pressed in and frictionally held into the groove. I have never tried it and it is a difficult thing to analyze mathematically, because we don't know just what the conditions are. But if that groove was not machined, if it was just left rough, I doubt if it could be made to hold at all, and as the pressure came up the tendency would be for water to work around over the flange and cause leakage over the top of it and maybe depress the flange down and perhaps have it collapse. That is, of course, more or less conjectural unless one would try it. But the mode of operation is entirely different, and I think the result is different. I think this result is superior.

Mr. Middleton: Now I will ask that the bailiff hand to the witness Defendants' Exhibit 49, which I will first offer in evidence.

Mr. Graham: I have an objection to that model, if your Honor please, that it is not in accordance with

(Testimony of George F. McDougall.)

the Lanninger patent if it is offered under the proposition that it is.

The Court: Well, let's find out.

Mr. Graham: I just make my objection at this time.

The Court: They have a right to construct a model of their own giving their conception of what the teachings of the patent are and offer it upon making proper proof of it. You don't have to admit that it is. Then, of course, they will have to prove through this witness that it is constructed according to the [162] teachings of the patent in suit.

Mr. Graham: Well, we are just noting our objection at this time to the offer of the model.

The Court: What are you offering it as?

Mr. Middleton: As a model of Claim 3 of the Lanninger patent in suit, with the particular purpose in this connection of demonstrating through the witness the operation of the gasket.

The Court: Of course, there will be no foundation there because they will not concede that this is constructed according to the teachings of the patent, so you would have to have the expert testify first whether it is.

Mr. Middleton: Yes.

The Court: I will not rule on the matter until a further foundation has been laid.

Q. (By Mr. Middleton) Now examining Pre-Trial Exhibit 49, Mr. McDougall, do you find in that instrumentality a pipe joint in connection with pipes one of which has an unthreaded end? A. Yes.

(Testimony of George F. McDougall.)

Q. Do you find a rigid coupling sleeve for coupling said pipes into which the unthreaded end extends? A. Yes.

Q. Does that sleeve have an interior annular groove in the inner surface? A. It does. [163]

Q. Does the instrumentality contain a packing of elastic material in the coupling sleeve?

A. Yes, sir.

Q. Does that consist of a free cylindrical part frictionally enclosing the unthreaded pipe end?

A. It does.

Q. Having a flange frictionally retained in the groove of the sleeve? A. It does.

Q. And means for hingedly securing said sleeve of the pipe having the unthreaded end?

A. Yes, that is also present.

Q. And does this particular instrumentality have cut from it a section in the bell of the female end to permit a view of the inside?

A. It does. Now may I have that copy of the patent?

Mr. Middleton: With this identification by the witness, your Honor, I will again offer the exhibit.

The Court: All right.

Mr. Graham: I object to it, if your Honor please, on the ground it is not in accordance with the teachings of Lanninger.

The Court: Well, the objection will be overruled. It is merely offered in conjunction with the opinion of this witness.

(Testimony of George F. McDougall.)

(The model of pipe coupling above referred to, so offered, having been theretofore marked Defendants' [164] Pre-Trial Exhibit 49-A and 49-B, respectively, was marked received as Defendants' Exhibit 49-A, 49-B.)

Q. (By Mr. Middleton) Now taking Exhibit 49, Mr. McDougall, will you please explain to the Court the operation and use of the gasket in that exhibit.

A. Removing the pipe with the unthreaded end we find the packing member is accurately described in Claim 3, and the cylindrical portion that encircles the pipe has the pressure lip or sealing lip which seals against the pipe by hydraulic pressure when the unthreaded end is exposed. That part of it operates precisely the same as a V-section packing. It also seals in the same manner. Now the other edge, however, of the packing is fitted into a groove here. Now I find that the groove in this particular one is machined and it is a fairly good fit for this flange, but we should remember that the pressure is on top and that holding the thing in my left hand with the shackle pointing to the left this outside surface of the flange is exposed to the atmosphere through here, so there is no supporting pressure in here, but pressure will come in here, will exist in here (illustrating). It will also have a tendency to compress this rubber somewhat, and I seriously question, although I cannot say definitely that it would happen, that the pressure will work this way right around that flange and will leak out. It might not. But it is not

(Testimony of George F. McDougall.)

sealed in the same way. There is [165] no pressure lip present on the other side here. If I can get this out now—which I think I can—now if we could bring this together into a U-shape, something like that (illustrating), and form a pressure lip right here as well as the one that already exists on here, then we would have to eliminate this internal groove here because we would need a smooth surface, and then this pressure lip if it existed could seal against this inner surface of the bell and you would have substantially the other packing. But as they exist the packings are not interchangeable from one bell to the other, because you would have to change both the packing and the bell in order to use it. They are not alike. And the structure in the exhibit containing the bayonet point does not respond to the elements recited in Claim 3 for the reasons that I have just given.

Q. Mr. McDougall, Mr. Vale in his testimony for the plaintiff described the action of the flange in Exhibit 49 there when introduced into the annular groove as a wedging action. Is that correct?

A. Yes, that was well stated. It is wedging action. It must depend on the wedging action for its tightness, because there is no hydraulic action there. The hydraulic pressure, as I pointed out just a bit ago, is all on one side.

Mr. Middleton: Will the bailiff please hand to the witness Exhibit 70.

Q. Now Mr. McDougall, considering the locking means as shown in [166] Exhibits 49 and 70 on the

(Testimony of George F. McDougall.)

one hand, and the two types of locking means shown in Exhibits 47 and 48 on the other—

A. Yes.

Q. —do you find between those two groups of locking means any difference in function and use?

A. Yes, there is a difference.

Q. What is that difference?

A. I think I would point that out in this way: We will assume we are laying pipe. Now the workman picks up one or the other—it is immaterial which—and we will assume that the other one lays on the ground. From the center of the pipe we put them together and lock them without going to the bell end. And if he is taking the pipe apart he can do the same thing. He can take it from the far end or near the center and disengage them and pull them apart and lay them aside before moving to another place. On the other hand, with Exhibit No. 70 he can do the same thing in the same way until he gets them together. Then he must lay down his pipe, which might or might not give trouble, to see about the registration of these two holes in the lug and shackle, and then insert this separate part here represented by the cotter key, and in disassembling he would have to do the same thing. And if the holes were made much enlarged, as here, there probably would not be much difficulty in getting them together, especially if the pipe were small so that he might handle it easily to get the pin in. But [167] then another thing: When he comes to take them apart—I

(Testimony of George F. McDougall.)

think I have already said that—when he comes to take them apart he would reverse the operation.

Mr. Middleton: Will the bailiff please hand to the witness Exhibit 69. That is a large sketch containing four figures.

Q. Now through the witness of the plaintiff an effort has been made to correlate the identification symbols of the two sketches of the patent in suit to the parts of the two sketches of the accused structure. I wish, Mr. McDougall, that you would take a pointer and correlate those identification symbols to the parts of the accused structure, pointing out the similarities and any differences that occur to you.

A. Answering your question, I will step down from the stand. I find that the draftsman has used a small “a” to indicate the bell end of the coupling.

Q. Which coupling, now?

A. Well, both of them.

Q. All right.

A. And that is correct in both cases. They both serve the same general purpose. I find that he has used the indicia “b” to indicate the free cylindrical portion of the packing shown in Figure 1 of the Lanninger patent, and he has used the same indicator to indicate the inside one of the lips of the V packing used in Defendants’ Exhibit 47. So far there is no objection. The letter “c” has been used to indicate the pipe having the [168] unthreaded end, taken from Lanninger Figure 1, and the same index has been used to indicate the pipe having the unthreaded end in Defendants’ Exhibit 47, and still there is no

(Testimony of George F. McDougall.)

correction. They are all correct so far. Now he has used the letter "d" to indicate the cotter pin in the representation of the Lanninger Figure 1, and he has used "a₁", "c₁" and "d" to indicate a hook. Now "c₁" indicates an eye in the Lanninger patent and "a₁" indicates a shackle. An he finds all three of them in a hook, which is not correct, in my opinion. I don't think one plain hook can represent three different structures. Now he has the letter "e" indicating the flange in the packing in the Lanninger section, Figure 1, and he uses the same small "e" to indicate the outside of the V-shaped packing well backed away from the sealing lip portion in Defendants' Exhibit 47, and it indicates a flange in one place and half of the V-section packing in the other, which is not correct. I note also that the sealing lip opposite the one correctly indicated by "b" in the drawing of Exhibit 47 is not pointed out and has no index number, which it should have because it has a function equal to the one that is indexed.

Passing now to the section of Lanninger Figure 4, which is practically the reverse of the one shown in Figure 1, the same letters "a₁", "c₁" and "d" have been used to indicate a hook—no, "a₁" is used to indicate a shackle and [169] "c₁" indicates an eye and "d" indicates a cotter pin. And in transferring those letters to Defendants' Exhibit 48 he again puts all three numbers as indicating one member, a hook. The keeper for the hook he does not signify with a reference, nor does he put one upon the pivot upon which the hook turns. He makes the same error in

(Testimony of George F. McDougall.)

designating a part of the packing delineated as a flange in Figure 4 of Lanninger, and he shows the outside surface of the V-section packing, which is not a flange as heretofore stated.

The Court: You drop your voice too much.

A. He again uses the letter "e" to indicate an indefinite area of the outside surface of the V-shaped packing in Defendants' Exhibit 48, which is no wise, shape, function or result or anything else resembles a flange. And again, he has omitted to designate the opposite or bell side of the sealing lip by reference numeral in order to point it out. So the drawings are quite well done, the sections of Exhibit 48 and Exhibit 47 are well executed and not misleading, but the application of the reference letters in my opinion is misleading, to the extent that I have indicated.

Mr. Middleton: Will the bailiff kindly hand to the witness Exhibit 17.

Q. Having reference now to Exhibit 17, Mr. McDougall, do you find in that structure a pipe joint in connection with pipes one of which has an unthreaded end? [170]

A. Yes, sir.

Q. Do you find a rigid coupling sleeve for coupling said pipes into which said unthreaded end extends?

A. Yes, sir.

Q. Does that sleeve have an interior annular groove in the inner surface?

A. It does not. It has a frusta-conical enlargement near the end.

Q. Does it contain a packing of elastic material in the coupling sleeve?

A. It does.

(Testimony of George F. McDougall.)

Q. Does that packing consist of a free cylindrical part frictionally enclosing the unthreaded pipe end?

A. Yes, sir.

Q. And does it have a flange frictionally retained in the groove or the sleeve? A. It does not.

Q. Does that structure contain means for hingedly securing the sleeve on the pipe having the unthreaded pipe end?

A. It has means for latching, but no means of hingedly securing in the sense that is shown in the Lanninger patent. The latch is practically a replica of the latch in Exhibit 48.

The Court: What takes the place of the flange in that device?

A. What takes the place of the flange in that device? Why, the [171] packing is a V-section packing.

The Court: It is a what?

A. The packing is a V-section packing in principle, precisely the same thing as is used in 48.

Q. (By Mr. Middleton) 47 or 48? A. 47.

The Court: All right.

Mr. Middleton: Will the Court examine that packing, please.

Q. So that you characterize that packing as a V-section packing and not a flange packing; is that correct?

A. It is a V-section packing. It has two sealing lips that work oppositely and works precisely as I have previously explained.

Mr. Middleton: Will the bailiff please hand to

(Testimony of George F. McDougall.)

the witness Exhibit 40, which is a patent. I have an extra copy for the Court here.

Q. Now referring, Mr. McDougall, to the structure delineated in Exhibit 40, being United States Letters Patent No. 811,812, issued on February 6th, 1906, to E. V. Anderson, will you please state whether or not you find in the structure of that patent a pipe joint in connection with pipes? A. Yes, sir.

Q. Does one of those pipes have an unthreaded end? A. Yes, sir.

Q. Do you find in the structure a rigid coupling sleeve for coupling said pipes into which the unthreaded end extends? [172] A. I do.

Q. Does that sleeve have an interior annular groove in the inner surface?

A. The interior annular groove is in the——

Mr. Graham: I object to that.

Mr. Middleton: Just answer the question. Does it or does it not?

A. There is an interior annular groove.

Mr. Graham: I am objecting to the exhibit on the ground that it is a railway standpipe in which the pressure always flows downwardly. It is not a pipe for conveying water generally.

The Court: I think this, however, was one of the references in the Patent Office, wasn't it?

Mr. Graham: I believe it was.

The Court: Anderson and Gorter and other were cited at one time or another.

Mr. Graham: I am sure that it was.

(Testimony of George F. McDougall.)

The Court: This is about the poorest job of photostating I have ever seen. It would take a man with better eyes than mine are to read a portion of this record. I don't know whether it is because of the faintness of the typing or whether it is because of the pooriness of the photography. Just let me see a moment.

Mr. Middleton: Anderson is cited in the last action.

The Court: What?

Mr. Middleton: Anderson was cited in the last real action by [173] the Examiner before the final formalities.

The Court: Well, I will overrule the objection. It is a pipe connection. It is not so far removed from this one.

(The copy of Patent 811,812, E. V. Anderson, so offered, having been previously marked Defendants' Pre-Trial Exhibit 40, was marked received as Defendants' Exhibit 40.)

[Printer's Note: Defendants' Exhibit No. 40 was previously received in evidence on page 188 of this printed record. It is set out in full on page 433.]

Mr. Middleton: Will you please read the last question and answer, Mr. Reporter.

(The record was read as requested.)

The Witness: I want to correct that answer. After examining this thing with a glass I want to state

(Testimony of George F. McDougall.)

that a site for packing if formed, but it is not properly named a groove. It has only one side.

Q. Is there there disclosed a packing of elastic material in the coupling sleeve? A. Yes, sir.

Q. Does that consist of a free cylindrical part frictionally enclosing the unthreaded pipe end?

A. Part of it does, yes. It is a U-section packing.

Q. Does that packing have a flange frictionally retained in the groove of the sleeve?

A. It does not.

The Court: Anderson does not claim the packing in his claims.

Mr. Middleton: I was endeavoring to digest these claims, your [174] Honor, in order to show the manner in which Lanninger obtained his patent in view of this patent.

Mr. Graham: Well, your Honor, that is in the File Wrapper.

The Court: The File Wrapper would speak for that.

Mr. Graham: Which is not subject to examination.

The Court: That is all right. In other words, there are two elements absent from Anderson according to the statement of this witness, because he doesn't show any packing, either a V-shaped or hat-shaped or flange-shaped.

Mr. Middleton: The Court, I am afraid, did not understand the witness. The witness did testify that there is a U-shaped packing in answer—

(Testimony of George F. McDougall.)

The Court: He doesn't claim it. It can't be there unless he claims it.

Mr. Middleton: The witness, I believe, was reading from the drawings, your Honor.

The Court: Well, that is right. The drawings are merely one illustration. You can't infringe the drawings but you infringe the claims. He doesn't claim it. The drawings may be referred to merely when there is ambiguity, but when a man doesn't claim that element as a part of his invention, you can't supply it from the drawings and say that there is. Well, all right. Go ahead.

Q. (By Mr. Middleton) Do you find in the structure of Anderson a means for hingedly securing the sleeve to the pipe having the [175] unthreaded end?

A. Yes, there is a hinge present there.

The Court: I didn't hear your answer, please.

A. There is a hinge present; not shown in the same figure that I was testifying from. I was testifying from Figure 4. The hinge, however, is shown in Figure 1 and I think Figure 2.

The Court: But he doesn't claim it in any of his claims. He only has three claims, and in none of them does he claim that as an element of the combination itself.

The Witness: Were you speaking to me?

The Court: I say, neither of these elements to which you have testified are claimed by him in his claims as elements of the combination. Whether he illustrates them or not does not make a bit of difference, because he has limited himself by not claiming

(Testimony of George F. McDougall.)

them in his claims. You can't enlarge a claim by your specifications. You can limit it, but you can't enlarge it.

Mr. Middleton: He has, however, delineated the structure for the public in his drawings.

The Court: What?

Mr. Middleton: I say, he has delineated the structure for the public in his drawings.

The Court: Well, he has delineated it, but what he does not claim goes in the public domain.

Mr. Middleton: That we come to in Lanninger later.

The Court: What? [176]

Mr. Middleton: I say that we come to in Lanninger later.

The Court: Well, I don't think it is a fair claim of anticipation to go to the drawings in a patent which does not claim the elements which are claimed here. After all, anticipation is not shown by drawings. You are not claiming publication through drawings. The filing in the Patent Office is not publication to the world. A patent is not a publication. Publication means something outside the Patent Office. Drawings are merely illustrative of the idea of the inventor, embodying his invention, and before you can show anticipation you have to prove not drawings but claims in a patent suit which are identical with those claims here. The claims here contain some of the elements, but at least two of them are not claimed in that. Take Anderson's claim 3: "In a valve mechanism the

(Testimony of George F. McDougall.)

combination with a casing provided with an internal valve-seat and embodying in its construction two internal hollow cylinders differing in diameter and having a common axis, one end of the smaller cylinder surrounding the valve-seat and its opposite end communicating with the larger cylinder, the smaller cylinder having outlet for the flow of liquid when the valve is open, a combined valve and piston having its valve portion when closed, substantially fitting the smaller cylinder throughout the length thereof and guided thereby and having the end opposite the piston portion constructed to seat on the valve-seat, the piston portion fitting the larger cylinder [177] der a passage connecting the larger cylinder with a source of supply and with a waste-passage and a valve for alternately closing said passages." He had in mind an entirely different device there trying to achieve different results—trying to control the flow of water to standpipes. The object is the opening and closing of the valve effected by the pressure of the water supply. He was not trying to secure a flexible joint.

In your opinion, Mr. McDougall, do the claims of Anderson read upon this structure—not the drawings; I am not interested in the drawings—you don't infringe drawings—but show me which of these claims of Anderson read upon the device—

A. I didn't read any claims.

The Court: What?

(Testimony of George F. McDougall.)

A. I didn't read any of the claims.

The Court: Then how can you claim anticipation? You don't anticipate a drawing.

A. I wasn't anticipating anything. I was just explaining, your Honor, what was a matter of public knowledge when these drawings were printed.

The Court: Well, all right.

Mr. Middleton: Now if the Court please, before I go into the next subject with this witness, I revert to a matter that came up in the opening statement, and in fairness to the Court I want to make my proposed procedure plain so that if objection [178] it made we may at least know where we stand beforehand. In my opening statement I referred to the action of the plaintiff in this case in drafting certain patent claims for the use of one Ralph H. Pierce, the effect of which in my judgment was to place a construction by this plaintiff on its claims which would now defeat its assertion of the claims in the scope in which they are asserted. The Court instructed that in order to bring anything of that sort into this record it would be necessary that it be tied up to the actual defendants here in the proceedings. In other words, that the estoppel might be set up by these defendants by raising all matters communicated to them. I believe I am correct, your Honor, that far?

The Court: I think so.

Mr. Middleton: And I propose to start, then, with the matter of tying up, so that that matter

(Testimony of George F. McDougall.)

may be determined first, getting back from that to the substance of what was actually done.

The Court: Well, I can't tell by your general statement how you are going to tie it up, but I repeat what I said before. What I meant to say was this: The only estoppel that can arise would be an estoppel in pais that might go to the equity side of the Court. If, for instance, a patentee knows that the manufacturer has been manufacturing a product and he, having that brought to his knowledge, consults with the manufacturer and leads him to believe that his device does not infringe, an [179] estoppel might arise out of that particular dealing. But any dealings with a third party whereby they interpret their claims and whereby they may have given the impression that certain claims in another patent did not conflict with his, that would not amount to estoppel at all. There is no such things as estoppel by interpretation of claims that I have ever heard of in the law of patents, and I have read all the texts. But I have never heard of such a thing as an estoppel by interpretation. If a man is not bound by the embodiment of his claims into a particular device by his drawings, how can he be bound by authorizing a third party to secure a patent on an improvement or modification of his device? Mr. Pierce, if it were claimed that his device infringes and that his patent is invalid in the light of Lanninger's patent, might show the Court that during the pendency of the patent outside the Patent Office

(Testimony of George F. McDougall.)

that they associated and they negotiated and induced him to expend money, effort and energy to secure something which they now claim infringes. That in itself would not defeat their [180] claim. It might go to the question of whether the Court under the circumstances would issue equitable relief or cause them to account. The Court might hold that while it was infringed they were not entitled to an injunction under the circumstances, or at least he was entitled to the profit he had made because they had induced him to expend his money.

Mr. Middleton: I have this citation, your Honor, from the present edition of Walker. That is a four volume work, page 1208. "A patentee's appraisal of the nature of his invention is of great importance. The acts and conduct of the owner of a patent may also give a construction to a claim which will avoid infringement. For instance, where the patentee had for a number of years placed a certain construction on a claim, with knowledge that the defendant during that time had been selling a device for a similar purpose to that of the complainant but which did not infringe the claim as so construed, the complainant was held to be estopped from claiming infringement."

The Court: That is exactly what I said; but not as a third party. Not in aiding somebody else. You would have to show that this concern knew that these people were manufacturing this product for a number of years; that they had communica-

(Testimony of George F. McDougall.)

tions with them and they induced them to go on and now all of a sudden they come in. [181]

I had the Johns-Manville case.

In that case they had a person who had a paper patent relating to an entirely different art. He was constructing what he called a building brick which had a sound deadening effect, and it was made like a brick, but it was shown in that case that no claim was ever made, and that this particular product by Johns-Manville had been on the market for fifteen years and that they had expended millions of dollars in developing it, and this man sat by and saw it done, and then all of a sudden he comes in and says, "Wait a minute, here; you owe me royalties. That is nothing more than an adaptation of my product." Now I held there that was an element to be considered, especially when you have a paper patent. In other words, the principle of estoppel works [182] both ways, but in each case you have to bring the estoppel home to the particular litigant; not to somebody else.

Mr. Middleton: It was that matter of bringing it home, your Honor, which I proposed to start on with Mr. McDougall.

The Court: We will take a short recess. I merely wanted you to understand my position and the thing I based it on.

(Short recess.)

Q. (By Mr. Middleton) Mr. McDougall, may I ask whether or not you represented Ralph H.

(Testimony of George F. McDougall.)

Pierce of Eugene, Oregon, as his patent attorney in making application in his behalf to the United States Patent Office for a locking type of pipe coupling in the year 1937?

A. I was his patent attorney and made such an application.

Q. In that connection, Mr. McDougall, I will ask you whether or not the plaintiff in this litigation offered to assist you by preparing claims to be incorporated in Mr. Pierce's application?

A. Mr. Pierce instructed me—I will answer that yes and explain it. Mr. Pierce instructed me to communicate the contents of that application to the plaintiffs in this case, and [183] after having done so they suggested a list of claims that they thought I should add to the application.

Mr. Graham: Now that is objected to as irrelevant and immaterial to any issue in this case.

The Court: Well, I am going to allow this to go in to see how counsel is going to tie the present plaintiff to that situation.

Mr. Middleton: I will endeavor to do the tying as quickly as possible.

The Court: All right. Go ahead.

Mr. Middleton: May I have, please, Mr. Bailiff, Pre-Trial Exhibit 87. That is a cardboard file of legal papers. I will offer in evidence at this time, your Honor, subject to the identification of a witness, Pre-Trial Exhibit 87-J, a letter from California Corrugated Culvert Company to George F. McDougall.

(Testimony of George F. McDougall.)

Mr. Graham: The same objection for the record.

The Court: All right. Objection overruled.

(The letter above referred to, dated January 7th, 1938, so offered, having been theretofore marked Defendants' Pre-Trial Exhibit 87-J, was marked received as Defendants' Exhibit 87-J.)

Q. (By Mr. Middleton) Mr. McDougall, I will ask that you state whether or not you received through the United States mail at or about the date it bears Exhibit 87-J? [184]

A. I did.

Q. Will you read it to the Court, please.

A. It is addressed to myself, Consulting Engineer, Board of Trade Building, Portland, Oregon. "Dear Sir: We recently signed an agreement with Mr. R. A. Pierce for the exclusive use of his new locking type of coupling, and in this agreement we agreed to render assistance, if possible, in the procuring of the best patent possible on this new coupling.

"We referred the specifications which Mr. Pierce gave to us to our patent attorneys, and they feel that the patent will be helped materially by the addition of the claims which we are attaching to this letter. We hope, therefore, that you can introduce these into the case.

"Will you please arrange to let us have copies of all papers passed between yourself and the Patent Office and also copies of any

(Testimony of George F. McDougall.)

action taken by the Examiner. We would like to review all the data and be helpful to you if possible on any replies that are made.

“A copy of this letter is going to Mr. Pierce today.”

Signed by “California Corrugated Culvert Co., L. W. Wyman, Vice-President and Chief Engineer.”

Mr. Middleton: I will ask that the bailiff hand to the witness Pre-Trial Exhibits 88 and 88-A.

Q. Referring to Pre-Trial Exhibit 88-A, Mr. McDougall, I will ask you whether or not that is the set of claims which you re- [185] ceived in the mail with the letter you have just read.

A. It is with the exception of the lead pencil work there. That I put on myself.

Mr. Graham: Mr. Middleton, will you offer that so we can——

Mr. Middleton: I wanted to identify it first. I now offer in evidence Pre-Trial Exhibit 88-A.

Mr. Graham: The same objection as to relevancy and materiality.

The Court: Well, I will overrule the objection and reserve a motion to strike later.

Mr. Middleton: I may as well offer Exhibit 88 so it is complete, and I do so.

(The copy of letter dated January 11, 1938, addressed to Ralph H. Pierce, and unsigned, having been theretofore marked Defendants' Pre-Trial Exhibit 88, and three sheets con-

(Testimony of George F. McDougall.)

taining Paragraphs numbered 6 to 12, inclusive, having been theretofore marked Defendants' Pre-Trial Exhibit 88-A, so offered, were thereupon marked received as Defendants' Exhibits 88 and 88-A, respectively.)

Q. Mr. McDougall, I believe you stated that the pencil memoranda and lines upon the document 88-A are matters that you placed there?

A. That is correct.

Q. Is the typed portion of the document in the same condition as when originally received by you excepting for these pencil [186] marks?

A. It is. None of the typed portion has been changed in any respect.

Q. Looking at the paragraph marked "10" on the second page of Exhibit 88-A, will you please read that to the court.

A. "10", which would be the number of the claim, reads: "A slip joint for pipe sections comprising a sleeve having means for receiving a flexible packing member near each end, said packing members surrounding and frictionally gripping the ends of the respective pipe sections when said sections are inserted into the sleeve, and means carried by said pipe sections for separably connecting them together, said connecting means being within said sleeve and independent thereof and being formed to permit the axes of said pipe sections to be moved out of alignment."

Mr. Middleton: I now offer in evidence Pre-Trial Exhibit 82.

(Testimony of George F. McDougall.)

Mr. Graham: Could I reserve my same objection?

The Court: Yes. This group is allowed with the understanding it is going to be connected.

(The model referred to, consisting of three parts, so offered, having been previously marked Defendants' Pre-Trial Exhibits 82-A, 82-B and 82-C, were thereupon marked received as Defendants' Exhibits 82-A, 82-B and 82-C, respectively.) [187]

Q. (By Mr. Middleton) Mr. McDougall, examining now the exhibit you hold in your hand, will you please give me the number again?

A. Exhibit No. 82-A, 82-B and 82-C.

Q. Examining that exhibit with particular reference to the interior locking means, I will ask you whether or not that locking means is the locking means covered by the Pierce application for patent we have been discussing?

A. Yes, it is. It is very properly stated in that claim that I read you.

Q. Now then, in the year 1938 did you or did you not have any communication with the officers of the defendants in this case concerning the matter of their right to make, sell or [189] use the devices corresponding to Exhibits 47 and 48 in this litigation? A. I did.

Mr. Graham: I object to that, if your Honor please, with reference to Exhibit 47 and 48 until there is some connection between 47 and 48 and the correspondence that he had. He can ask if

(Testimony of George F. McDougall.)

he had some correspondence in those years, but he cannot ask him as to whether it was relative to Exhibit 47 and 48.

The Court: Well, it is merely trying to identify correspondence; that is all. He probably proposes to offer it later on.

Mr. Middleton: This was a conversation, your Honor; not correspondence, between McDougall and these defendants through their representative.

Mr. Graham: McDougall and these defendants?

Mr. Middleton: That is right.

Mr. Graham: These defendants?

Mr. Middleton: These defendants.

Mr. Graham: You mean the plaintiff.

Mr. Middleton: These defendants.

Mr. Graham: McDougall and these defendants?

Mr. Middleton: That is right.

The Court: I don't see how that bears. He was not appointed agent. If he had a communication with the plaintiff with regard to the lock, all right, but they didn't appoint him an agent to communicate anything to anybody else. [190]

Mr. Middleton: That is true, your Honor, excepting that I now propose to show that what happened in connection with this lock is now communicated to the defendants and they have acted thereon.

The Court: Well, by whom? The plaintiff did not authorize Mr. McDougall to communicate to outsiders the correspondence they had. They were merely discussing the Pierce patent. Let's assume

(Testimony of George F. McDougall.)

that you show that he, Mr. McDougall, told them to go ahead and adopt that latch instead of the latch on the other, that would not be binding on the plaintiffs or excuse infringement.

Mr. Middleton: That he did so as the agent of Mr. Pierce, to whom this representation was made.

The Court: You will have to make a showing that the letters went beyond the discussion and that they authorized him to communicate that information to others. I can't see any laches or that the correspondence that he had with the others would be binding on them as authorizing a third party, with whom they were not communicating, to go ahead and infringe their patent.

Mr. Middleton: The point I am getting at, your Honor, is simply this: That plaintiffs place a given construction on their patent. They do that for the benefit of a party who is not here before the Court.

The Court: Yes. [191]

Mr. Middleton: That party, however, is in the business and his agent communicates the information imparted to him,—and it was not imparted in confidence,—to one of his customers who thereupon acts on it. They have knowledge of the plaintiff's construction and they have it authoritatively and they act on it.

Mr. Graham: If that were true, your Honor, that could go through an interminable chain of one person telling another and then that person

(Testimony of George F. McDougall.)

informing another and eventually getting around to the defendant in a patent suit.

The Court: Of course, regardless of what the plaintiff thought, if he secured a patent for Pierce he had a right to sell the device or to allow others to use it under certain circumstances.

Mr. Middleton: The plaintiff in this matter was merely offering the services of his patent counsel to elaborate on the claims that Pierce was developing.

The Court: Any patentee has a right to communicate with another with regard to a certain element in one of his patents for the purpose of considering the proposition of whether it would infringe or whether it would be an improvement on what he is seeking.

Mr. Middleton: But the point here is that the patentee's own construction of a patent at a given time is limited and narrowed by their action as that action is communicated to a [192] defendant in this lawsuit, or these defendants, who thereupon act on the construction placed by the plaintiffs here.

The Court: Oh, I will allow the matter to go in, but I will pay very little attention to it. I would not destroy a patent on that basis. There is no foundation in law for doing it. The mere fact somebody communicates that "I think you have something there" does not authorize a man to go ahead and copy another device. We are not talking about a latch here. We are talking about a

(Testimony of George F. McDougall.)

copy of an entire device. That is what is involved here. The Pierce patent deals only with one element, and that is the latch. The latch might be an improvement on the hingedly connected thing, and yet that would not affect the patent because a latch is old and so is a hinge. The Pierce improvement was merely on the latch, as I understand it.

Mr. Middleton: Well, if the Court takes that view I don't believe we should waste time on it.

The Court: Well, it is not a question of taking a view. That is the view that is disclosed by that communication. I will allow you to have him do that, but I will say that that is not an authorization to infringe.

Mr. Middleton: Not an authorization to infringe—

The Court: They might concede to one man by correspondence that he might have an improvement on his latch within their patent and yet insist that that is not a dedication of that latch, and yet they might claim as against a third party that [193] the whole combination is still good and hold them liable. This is merely in the nature of an equivalent. You can't bind yourself in the correspondence—I don't see anything in the letter as he read it—

Mr. Middleton: Not in this letter. I was purely identifying these claims by the letter.

The Court: I can't see anything in this letter which amounts to a limitation to the world of their interpretation of the claims.

(Testimony of George F. McDougall.)

Mr. Middleton: I am endeavoring to possibly save some time here. I trust I won't be taking too many liberties, but in the correspondence between Pierce and "Calco" we will find one letter in which, referring to this particular interlocking patent application, "Calco" states that they are referring Pierce's application to their patent attorneys to find whether or not there would be infringement of the Lanninger patent. Does that put a different view on it in the Court's mind? If it does not I don't think I will pursue this.

The Court: You see, we are not dealing here with infringement of a lock. We are dealing with infringement of six elements, and therefore any admission that they make as to the lock—the lock itself might be one element, and you can take one element of a combination and improve on it. You can't eliminate one element and have a combination, but if you change one element and secure a more satisfactory result—if your [194] contention, for instance, that this lock cannot be called a hingedly connected thing; that the lock is a lock and the hinge is a hinge, is correct, if your contention as made by Mr. McDougall that when you talk about a flange packing you have in mind something which has been so known to the trade and which has a definite shape, and that a hat-like packing is different, if that contention is correct, you see, there is no infringement because, unless these are within the range of equivalents, you have taken two elements and changed them and substituted something

(Testimony of George F. McDougall.)

else which performs a different function. This latch, for instance, performs two functions, you see, while the other performs one. It can be argued this latch not only holds them together but is an improvement on the other because it is disconnected by one manual movement while to disconnect the other you have to take out the spring cotter from the hole. Now I merely am giving this by way of illustration—I am not deciding it—because it is elementary patent law. In view of that fact I can't see how the correspondence, even if they show that they admitted that a latch of this character would be an improvement, would determine anything, because we are concerned here with an infringement of a device consisting of some six elements, the latch being only one part of it. As long as we have gone this far I am willing to allow him to testify what he told them, but I am indicating that in the light of the principles of law as [195] I conceive them it has very little weight or bearing upon the problem before us.

Mr. Middleton: Well, I started, and I will finish it out, your Honor.

The Court: All right.

Q. (By Mr. Middleton): You say that you then did have a conversation with these defendants in the year 1938?

A. With the head officers of the Alaska Junk Company; yes, sir.

Q. Who was the man?

A. Mr. Clyde Carroll.

(Testimony of George F. McDougall.)

Q. Did you call him or did he call you?

A. He called me.

Q. What did he ask you?

A. He told me that——

Mr. Graham: I object to that, if your Honor please.

A. He told me that some question had been raised regarding his right to sell Pierce couplers in view of the Lanninger patent. He asked me if I knew about it and I said I did, and he said Pierce had referred Mr. Carroll to me for an opinion on the matter, and I went down there to Mr. Carroll's office and talked to him at quite considerable length. My impression is that I wrote a letter, a written opinion, although I am unable to find a copy of it at this time.

Q. What did you tell him?

A. I told him that in view of my construction of the Lanninger [196] patent, and of the construction placed on it by the "Calco" people themselves, that I was certain there was no infringement of the Lanninger patent in the use and sale of the Pierce coupler.

Q. Did you go with Mr. Pierce's authorization?

Mr. Graham: I think this needs some definition of terms.

The Court: Beg pardon?

Mr. Graham: I don't like to be persistently objecting, but I think we need some definition of terms here. He is talking about a Pierce coupler,

(Testimony of George F. McDougall.)

but he doesn't say that the Pierce coupler contains this latch or hook member.

The Court: Of course, they are going to introduce the Pierce patent, I presume, if it has not been introduced yet to show what it was. The answer here anticipates what I thought the answer was going to be, that they were talking merely about the coupler. Of course, you are not charging violation of the coupler; you are charging violation of the entire device, of the claims.

Mr. Graham: Well, I won't persist in the objection, if your Honor please.

The Court: I will receive the testimony and then we will argue about its effect. After all, this is a court of equity. You can even receive immaterial testimony. You are supposed to disregard it. Counsel seems to think he has a point there, and I am letting him put in the facts. [197]

Q. (By Mr. Middleton): In talking to Mr. Carroll did you or did you not take into consideration what you knew about his Claim 10 embodied in Exhibit 88-A?

A. I took into consideration, certainly, all I knew about it and informed him that the then controller—I spoke of them as the owners of the Lanninger patent—had placed a construction on it which took the Pierce coupler outside of the Lanninger claim.

Q. Now by the Pierce coupler, Mr. McDougall, do you mean couplers such as Exhibits 47 and 48 here in evidence?

(Testimony of George F. McDougall.)

A. I mean couplers similar to these Exhibits 81-A, 81-B and 81-C and that Exhibit 47.

Q. That is 47 you have in your hand.

A. Is that 47? I don't know.

Q. Yes. A. And 47 and 48.

The Court: How about this one? What is this one?

A. The latch shown on Exhibit 48 had not been developed at that time.

Q. (By Mr. Middleton): Then it was not similar to 48, then? A. Not 48.

The Court: What is this one? 3?

Mr. Graham: I think that is also 3 and 48. The reason that there are two of those, 3 and 48, your Honor, is Exhibits 3 and 8 were put in on depositions and then we didn't have them avail- [198] able to put the pre-trial numbers in.

The Court: You consider this a Pierce coupler, too, don't you?

A. Oh, yes.

The Court: Exhibit 3?

A. Oh, yes.

The Court: Have you introduced the Pierce patent yet?

Mr. Middleton: I offered it, your Honor, but it was rejected.

The Court: Well, you may renew the offer now.

Mr. Middleton: Thank you. I then offer in evidence the Pierce patent—just a moment, your Honor. This is not the patent that issued pursuant to the application we have been discussing. This

(Testimony of George F. McDougall.)

application we are discussing never ripened into a patent.

The Court: All right.

Mr. Middleton: I don't want to mislead the Court.

The Court: All right. It has been sufficiently identified here.

Mr. Middleton: I will now ask the bailiff to hand me Exhibit 87, being the office file of George F. McDougall, and I now offer the entire exhibit, 87-J having been offered already in a preliminary way, as a single exhibit.

The Court: All right. It may be received.

(The office file folder of George F. McDougall and the documents contained therein, so offered, having been previously marked Defendants' Pre-Trial Exhibits 87, 87-A, 87-B, 87-C, 87-D, 87-E, [199] 87-F, 87-G, 87-H, 87-I, 87-J, 87-K, 87-L, 87-M, 87-N and 87-O, respectively, were marked received as Defendants' Exhibits 87 and 87-A to 87-O, respectively.)

Q. (By Mr. Middleton): Now will you state what that exhibit is, Mr. McDougall?

A. That was my office copies of the patent application made for Mr. Ralph H. Pierce in 1938. It was actually filed November 1st, 1937, and it was assigned Serial No. 172,201.

Q. Did patent ever issue on that application?

A. No, it did not. It was rejected on a foreign patent which shows the same structure.

(Testimony of George F. McDougall.)

Q. I will ask you, Mr. McDougall, to read to the Court the claim, if there is one, that is illustrative of the structure that was there claimed.

A. I will read Claim 1, which is illustrative: "A coupler hook structure for hooking the ends of two pipes together inside of a coupling, comprising a pair of hooks, one of which is made rigid with the inside of each pipe, said hooks being characterized by each having a shank made rigid with the inside of the pipe that projects beyond the end of the pipe more than its thickness and a hook portion thereof that is bent backwards more than 90 degrees and downwardly less than 90 degrees toward the axis of the pipe, to engage with the other hook on the other pipe." [200]

Q. Did that encompass a flexible joint?

A. Beg pardon?

Q. I say did that structure include a flexible joint in pipe couplings?

A. Yes. When the hooks are hooked together inside at one side of the pipe——

Q. Will you demonstrate to the Court, please?

The Court: Will all these models show that?

A. These hooks were part of the claim. When they insert these in here like this, and then relatively rotate one with respect to the other, the pipes lock together inside of the coupling and relatively the flexibility is not impaired.

Q. (By Mr. Middleton): Then please referring to Exhibit 88-A, will you read to the Court again, please, Claim 10.

A. Claim 10?

(Testimony of George F. McDougall.)

Q. Yes, so that we may get this together.

A. "A slip joint for pipe sections comprising a sleeve having means for receiving a flexible packing member near each end, said packing members surrounding and frictionally gripping the ends of the respective pipe sections when said sections are inserted into the sleeve, and means carried by said pipe sections for separably connecting them together, said connecting means being within said sleeve and independent thereof and being formed to permit the axes of said pipe sections to be moved out of alignment." [201]

The Court: All right. Unless you have something special I think we had better stop. We can't be working all the time.

(Thereupon a recess was taken until 2:00 o'clock P. M. of the same day, Friday, August 21st, 1942, at which time Court reconvened and proceedings herein were resumed as follows:)

Mr. Middleton: If the Court please, I have here another witness, an engineer, whom I would like to ask just a few questions about the operation of these packings so that we may dismiss him, if that is agreeable to the Court.

The Court: All right.

E. A. FINKBEINER

was thereupon produced as a witness in behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Middleton:

Q. Where do you live, Mr. Finkbeiner?

A. Portland.

Q. How long have you lived here?

A. About twenty-nine years.

Q. What is your business, Mr. Finkbeiner?

A. Engineering and sales.

Q. What is your education in engineering?

A. I am a graduate mechanical engineer from the University of [202] Michigan in 1904.

Q. What further work have you done in the engineering line?

A. After college I followed engineering and designing of hydraulic and steam equipment for ten years, and then branched out into sales engineering.

Q. What line of equipment is included in your sales?

A. All classes of power pumps and power equipment.

Q. Are those devices employing hydraulic equipment and principles? A. Absolutely.

Q. Are you a registered engineer in the State of Oregon? A. Yes, sir.

Mr. Middleton: Will the bailiff please hand to the witness Exhibits 4 and 6.

Q. Are you familiar, Mr. Finkbeiner, in the pur-

(Testimony of E. A. Finkbeiner.)

suit of your profession with packings and gaskets of the same general type and character exemplified by Exhibits 4 and 6? A. Yes, sir.

Q. Do you know whether or not those two gaskets or packings are designated in the trade by definitive names? A. They are.

Q. Taking Exhibit 4—can you see the identification number there?

A. Yes, this is 4.

Q. Will you state to the Court the definitive name of that exhibit in the trade? [203]

A. Well, that is commonly known as a V-type or U-type packing.

Q. Are those names interchangeable?

A. Well, the distinction between the two is that the V-type is shaped more like a “V”, while the U-type is more like the letter “U”.

Q. Looking at Exhibit 6, what is the distinctive designation in the trade of that exhibit and instrumentalities like it?

A. Well, that packing is something like the packing known as the flange packing.

Mr. Middleton: I will ask the bailiff to hand the witness Exhibits 49 and 81.

Q. Now taking Exhibits 49 and 81 and the Exhibits 4 and 6, will you please describe to the Court the mode of operation of the gaskets embodied by Exhibits 4 and 6.

A. Well, this 81—

Q. Take it by itself first. A. How?

(Testimony of E. A. Finkbeiner.)

Q. Take it by itself first and then come to the other one.

A. This No. 81 employs this V-type gasket which fits into a groove in your tube or pipe here, whatever you call it, and depends entirely on hydraulic pressure for sealing.

Q. Does that mean as to both lips?

A. Both lips, both the outer and the inner lip, are held tight by the pressure. The greater the pressure the greater the pressure on the packing and the tighter your seal. [204]

Q. You say that that depends entirely upon the pressure for sealing?

A. That is right.

Q. Now then, take the other exhibit.

A. Well, this one apparently employs this flange packing, and that has the fitted groove in there. It does not have a compression flange there, though, does it? That inner flange is not movable, but that depends on the tight fit of that groove, apparently, to hold that there, and the other part depends on pressure.

Q. What are the means of sealing, then, in this structure?

A. Well, it is sealed by the flange around the tube here, but up in here it appears that you have got to have a good tight fit there or something to hold that to prevent the water from coming around, or any fluid you might have. In other words, you are depending on compression on this flange to seal that.

Q. And the other end is sealed hydraulically?

(Testimony of E. A. Finkbeiner.)

A. The other end is sealed hydraulically.

Mr. Middleton: You may cross examine.

Cross Examination

By Mr. Graham:

Q. Mr. Finkbeiner, do you sell packing members too?
A. Sell what?

Q. These packing members or gaskets?

A. Only as parts of the equipment that we handle and occasionally [205] for repairs.

Q. Now if you got an order for a 4-inch U-type gasket, would you furnish the customer one similar to that Exhibit 4?
A. That is this one?

Q. Yes.

A. Before we could furnish it we would have to know the shape of the U, the size and shape of the U, so it would fit into the place where he intended to use it.

Q. The U-type gasket is usually the same thickness in cross section all the way through, isn't it?

A. The U-type?

Q. Yes.
A. Not necessarily.

Q. They vary in thickness?

A. It could be.

Q. One wall is thicker than the other sometimes?

A. A U-type gasket made of leather is usually the same thickness, but when they are made of rubber they can vary in thickness.

Q. Now isn't it a fact that that is a special type of gasket that would not meet an order for either a U-type gasket or a V-type gasket?

(Testimony of E. A. Finkbeiner.)

A. You mean this one?

Q. Exhibit 4.

A. Exhibit 4. To furnish a U-type gasket, or whatever it may be, you would have to have the size and shape of the machine it goes [206] into. In other words, you have got to know the shape of the U before you could provide that packing.

Q. I am asking you if you received an order for a 4-inch U-type gasket would you furnish a gasket similar to that Exhibit 4?

A. I would have to know the size.

Q. I am not asking you that. Please answer the question.

A. What is your question again?

(Last question read.)

Mr. Middleton: I think, your Honor, the witness is entitled to explain his answer as he makes it.

The Court: Yes, but counsel is entitled to have an answer first and the explanation afterwards. The question is so framed that he can answer it.

Mr. Middleton: Would the Court instruct the witness to that effect so he may understand?

The Court: Yes. You may answer "yes" or "no", and then if you desire to explain your answer you may do so.

Mr. Middleton: Did you understand the Court, Mr. Finkbeiner?

The Witness: No, I didn't get that.

Mr. Middleton: The Court instructs you that you must answer "yes" or "no" but that you may

(Testimony of E. A. Finkbeiner.)

then explain your answer if you desire to do so.

The Witness: Will you let me have the question again, please.

(The question was re-read by the reporter.)

A. Similar to that? Yes, I would furnish a gasket similar to [207] this, but I would want all the details as to size of the space it was to go into in order to get the correct shape.

Q. (By Mr. Graham) What do you mean by "similar", when you say you would furnish a gasket similar to that?

A. Well, your question was would you furnish a gasket similar to this.

Q. What do you mean by "similar", when you said you would furnish one similar but different in shape?

A. I didn't say—I said one similar to this, but I would have to know the exact shape because U gaskets are not all the same shape.

Q. Then a U gasket may assume many shapes?

A. It may have different—just like this one—different thicknesses.

Q. What do you call the two parallel portions on a U-shaped gasket or the two portions that are substantially parallel?

A. Well, I don't know as they are ever called by name. They are just called U gaskets.

Q. What portion of that Exhibit 4 is the radially inward portion? You have Exhibit 4 in your hand?

A. Yes.

(Testimony of E. A. Finkbeiner.)

Q. It has two portions, has it not, joined together in a valley? A. Yes.

Q. What do you call the radially inner portion?

A. You mean the inner part of this? [208]

Q. Well, that would be the radially inner part?

A. Well, you might call that the inner leg and the outer leg.

Q. Then you would call the radially outer portion the outer leg?

A. It is the outer surface of the U packing, is what it is. The outer surface and the inner surface really would be the way to describe it.

Q. They are joined together?

A. That is right.

Q. And have an angular joining on the inner surface? A. That is right.

Q. If two parts of an object of that kind are joined together so that they have a relationship as in that gasket might not the inner one enclose a pipe inserted therein?

A. Sure; your inside one encloses the pipe.

Q. That would enclose the pipe?

A. That is right.

Q. Would the outer portion of the gasket extend radially outward from that pipe?

A. You say could the gasket extend radially outward?

Q. The outer portion of it, would that extend radially outward?

(Testimony of E. A. Finkbeiner.)

A. In that case you would have this other type of gasket then.

Q. Then both of those radially outer portions would extend outwardly from the portion engaged in the pipe?

A. No, this one does not extend outwardly. It extends, you might say, parallel with the inner rim. It has an inner rim [209] and an outer rim.

Q. What joins them together? A. Sir?

Q. They are joined together, aren't they?

A. These rims?

Q. Yes. A. Yes.

Q. What portion joins them together?

A. Well, it is the inner section of the two of them.

Q. How do they intersect?

A. Well, you take the inside here, you notice how—it is a V shape, and where the V is formed that is where they meet and join together.

Mr. Graham: May I ask the witness to speak a little bit louder?

The Court: Yes, speak a little louder.

A. The inner rim and outer rim have a V shape between them, and at the intersection of that V shape is where they are joined together.

Q. (By Mr. Graham) Have you ever heard of a member spoken of as a flange where they are joined on an angle?

A. I don't understand the question.

Q. Have you ever heard of members referred

(Testimony of E. A. Finkbeiner.)

to as flanged relatively when they have an angular junction?

A. Yes. That would be similar to this (indicating). [210]

Q. That is, you would speak of that as a flange?

A. That is right.

Mr. Middleton: By "this" you mean Exhibit 6?

A. Exhibit 6. I guess that is 6, yes.

Q. (By Mr. Graham) Does that flanged joining have to be a right angle?

A. Well, if they are at right angles you don't get the V or U pattern. This is your V or U type. This one is right angles, which makes it a flange.

Q. You never heard of a flange being anything other than a right angle, a right angle junction?

A. Well, the right angle junction is commonly known as the flange type.

Q. You never heard of a flange being at a greater angle than a right angle?

A. Well, I really don't understand. Have you got a drawing of what you have in mind there?

Mr. Graham: May I illustrate what I mean on the board, your Honor?

The Court: Yes.

Q. (By Mr. Graham) Now if a member came down that way (drawing diagram on blackboard) and had a portion on that way at a right angle of 90 degrees you would say that was a flange. Now, if the same member—you wanted to join something to it at a greater angle than a right

(Testimony of E. A. Finkbeiner.)

angle you would say that was not a flange; [211] is that right?

A. Well, are you speaking about packing now, or any pipe or something like that? Are you referring to packing?

Q. Let me ask you, do you know what a flange is? A. Yes.

Q. I am speaking in common parlance. Is that a flange if it serves a function—

A. Well, when you are talking about packing, if you had a packing that shape you are approaching a V-type again.

Q. I am asking whether that is a flange.

A. Well, are you speaking about packing or structural members or what?

Q. Now you say you know what a flange is.

A. Yes.

Q. Now is that a flange?

A. This is a flange type packing because it has a flange on it.

Q. And what is the other type?

A. U-type or V-type.

Q. All right. Let's take the V-type. What is the relationship of this member to this member (illustrating)? Is it a flanged relationship?

A. It is a V form of packing.

Q. What is the mechanical structure? A V is not anything in mechanics, is it? What element is a V in mechanics?

A. Well, it is just a term applied for shape.

(Testimony of E. A. Finkbeiner.)

Q. Now a flange is a mechanical term, isn't it?

A. Yes.

Q. Is one of these members not a V flange with relation to another in a packing?

A. Well, they are not commonly known as flanges.

Q. Are they parallel? A. What?

Q. Are they parallel?

A. I would not call them so.

Q. What is their relationship?

A. Just a matter of shape.

Q. You are a mechanical engineer. What is the mechanical relation of two members joined that way (indicating)?

A. Well, they are joined together to make a V shape. That is why you get the distinction between the flange type and the V-type.

Q. All right. Now suppose there were members like that at right angles. A. Yes.

Q. You have mechanically a name for that, haven't you, if that was a cross section of a member?

A. Yes, in a packing that would be called a flange type.

Q. Then if you revert that over from a vertical line to a horizontal line and turn it in this position (illustrating on blackboard) where the axis of the juncture is vertical you have got the flange type just turned at a different angle, [213] haven't you? In other words, where one leg is vertical and the other is horizontal you have got a wide

(Testimony of E. A. Finkbeiner.)

V, haven't you? If it is that way it is a V (indicating)?

A. That is right.

Q. And if it is that way you say it is flanged?

A. Well, one is a V shape and the other is an L shape.

Q. One is L-shaped, and the "L" when you turn it this way is a relatively wide V?

A. Well, but then that does not really apply in packing. In packing the angle——

Q. I am trying to get a name for a portion. I am not asking you about the function. I am asking what you would call that junction between those two elements on Exhibit 4, the radially inner and the radially outer?

A. Well, in packing you would call this a flange type and the other one a V or U type or a cross between them.

Q. All right. Now the angular junction between the two, one has a right angle?

A. That is right.

Q. Is that your point?

A. That is right.

Q. And one has something less than a right angle?

A. That is right.

Q. If you made that angle a little wider it would be a right angle; is that right? [214]

A. Well, if you made it wider you would have what you have got above there.

Q. But this you call a flange packing?

A. That is right.

(Testimony of E. A. Finkbeiner.)

Q. And then when you turn that in a little bit different direction those legs, as you call them, haven't any flanged relationship at all?

A. I didn't say that. But you have got into what you call a V-type and a flange-type of packing.

Q. Well, is one of these members flanged relative to the other?

A. Well, when you are speaking about packing——

Q. Can you answer my question?

The Court: He is not talking about packing. He is talking about mechanics in general, whether that could be a flange.

A. In mechanics? Yes, it would be a flange in mechanics, but not as applied to packing.

Q. (By Mr. Graham) But as a trade name that is used in the trade to distinguish them as commercial propositions you would call one a flange?

A. Call one a flange packing.

Q. You might call another a V and you might call another a U? A. That is right.

Q. But those are trade terms to distinguish?

A. That is right.

Q. What were the trade terms in 1923? [215]

A. As far as I know they have not changed.

Q. Were you in business at that time?

A. Yes, sir.

Q. They still called them——

A. U packing.

(Testimony of E. A. Finkbeiner.)

Q. U packings?

A. And flange packings.

Q. And V packings, so that back in 1923 the flange packing and the V packing would both be relatively flanged portions mechanically?

A. Well, we would not commonly speak of them as a flange.

Q. I am not talking about what you would speak of them as, as trade terms. What would be their mechanical relationship, their structural mechanical relationship, as you see here on the blackboard?

A. Well, as I see it you would have there the flange type, the right angle type, and the other is a V or U type.

Q. Aren't you getting back to calling them what they are called by the commercial trade?

A. Well, we have to call them by what they are known as.

Q. In commercial language, but what is their structural relationship? Call them A, B and C, if you want to, but what is their mechanical structural relationship? Those two members I will indicate "A" and "B" (indicating on blackboard).

A. Well, as related to packing they would be the flange [216] type and the V type. That is the only way I can describe it.

The Court: What do you call a flange? How would you define a flange generally, the dictionary definition? A. A flange?

The Court: Yes.

A. Well, a flange is a projection; for instance,

(Testimony of E. A. Finkbeiner.)

on a pipe it is a projection at right angles at the end of the pipe for joining two adjacent sections of pipe.

The Court: Well, using it in packings the phrase "flange packing" has acquired a special meaning and refers to a flange of that angle? It is a different angle—a right angle, I mean?

A. That is it; like this one (indicating).

The Court: Like No. 6? A. Yes, sir.

The Court: No. 4 overlaps more like——

A. Well, that is made like a V.

The Court: A V?

A. Yes. The application of this is different from that. This depends on clamping to make this joint here for fitting it tight, while this just depends on pressure on the inside for forcing the two members apart.

Q. (By Mr. Graham) Would you call this radially outer member a rim?

A. You could call it the outer rim and inner rim. [217]

Q. What is their relative angular relationship?

A. Well, anything from a V to a U.

Q. This figure "A" here approximately represents the shape of that inner channel in cross section, does it not? A. That is right.

Q. And this approximately represents the angle of Exhibit 6? A. That is right.

Q. And this you would say was flanged and this you would say was not flanged? A. No.

Q. That is, you say that Exhibit 6 has a flanged

(Testimony of E. A. Finkbeiner.)

relationship and Exhibit 4 does not have a flanged relationship, though the angular relationship between them is approximately the same?

A. Well, you can't make an angle out of that one, out of 4.

Q. Isn't there an angle in it?

A. It is an angle, yes, but not the same angle.

Q. How much difference is there, approximately?

A. Somewhere between—let's say about thirty or sixty degrees, something like that.

Q. This radially projecting member of Exhibit 6, or that radially extended member of Exhibit 6 extends into a groove in the sleeve of the coupling; is that correct?

A. That is the way it is shown on your sample here, yes.

Q. A little louder.

A. That is the way it is applied on that sample.

[218]

Q. Which sample is that?

A. Oh, one of these you handed me here a while ago.

The Court: I think it is obvious by now that that is a fact, and that is the way it is described in the patent. It has been described so often I don't see it is necessary to take the time to have the witness tell us that. It is evident that goes into a groove and is a means of holding it.

Q. (By Mr. Graham) And in Exhibit 4 the

(Testimony of E. A. Finkbeiner.)

radially outer member goes into a groove, an internal groove, in the sleeve, does it not?

A. Yes, but not the same as on this one.

The Court: What is the difference?

A. Well, this one, this No. 4, fits in this one, and we are not depending on clamping this packing in there. It is merely fitted in there, and we depend on tightness for the pressure to come in between the two rims of the packing, and that pressure between the rims forces the two rims of the packing out to make a tight joint. Now in this one you fit a tight flange in here, and you are depending on that flange to be clamped mechanically or otherwise to hold that tight.

Q. (By Mr. Graham) Now is the radially outer portion of Exhibit 6 held in the groove? That is the question I want you to answer.

A. Will you please repeat that question again?

Q. Is the radially outer portion of Exhibit 6 held in the groove in the sleeve? [219]

A. Is it held in the groove in the sleeve?

Q. Yes.

A. Yes, it is held in the groove, as I take it here—do you have another sample of this or just that one?

Mr. Middleton: You want a closed sample of that, Mr. Finkbeiner?

A. Yes, please.

Mr. Middleton: If you will look at the gray paint exhibit by your right foot.

A. Is that the same one? That is your V pack-

(Testimony of E. A. Finkbeiner.)

ing in that one. Do you have another sample of this packing?

Q. (By Mr. Graham) Now I think you have the right one, but I can't see the exhibit number from here. A. That is 47-B.

Q. All right. Now what packing have you in your hand, Mr. Finkbeiner?

A. That is No. 6.

Q. All right. Now let's take the other one, Exhibit No. 4, and will you take that Exhibit No. 47, which was the enameled one you had right there. A. This one?

Q. Yes. When inserted in the sleeve member is the radially outer portion of your packing member, Exhibit 4, held in an annular groove in the sleeve? A. It is. [220]

Q. Is it bolted in? A. No, sir.

Q. Glued in? A. No, sir.

Q. Is it held in by the friction between the inner face of the groove and the outer face of the packing member?

A. The packing No. 4 is made to correspond with the groove in your flange here or in your casing.

The Court: It fits in?

A. It fits in there.

Q. (By Mr. Graham) So that there is contact between the two?

A. Yes, they fit in there. They fit reasonably close.

(Testimony of E. A. Finkbeiner.)

Q. And it does not have motion to fall out of the groove because of the way it fits in there?

A. To fall out of the groove?

Q. Yes, it won't fall out of the groove when you take that pipe end out, will it?

A. No.

Q. In other words, it does not have motion in there; it is not loose?

A. No, it just fits reasonably tight, as I see it here.

Q. Now is that what you call a frictional fit?

A. A frictional fit?

Q. Yes.

A. No, that is not—I would not call that a frictional fit. [221] It is made to fit that groove.

Q. But it is a reasonably tight fit that has a resistance to motion in there?

A. Yes, you can take the shape as offering resistance to movement, yes.

Q. Now isn't that the meaning of friction, a contact which resists motion?

A. You don't get friction until you get motion.

Q. Well, it resists motion?

A. Friction will resist motion; yes, sir.

Q. And that has enough of a hold in there to keep it from falling out?

A. The friction doesn't hold it in there. It is the shape that holds it in there.

Q. It is the shape of the groove that holds it in there?

(Testimony of E. A. Finkbeiner.)

A. The shape of your packing.

Q. But it fits closely or snugly into that groove?

A. That is right.

Q. It fits so snugly that it won't fall out?

A. Well, it couldn't fall out from its shape, because your outer diameter——

Mr. Graham: May I ask that the witness answer my question, if your Honor please? I asked him if it fits so snugly that it won't fall out. That is capable of a "yes" or "no" answer.

The Court: I think you ought to be able to give an answer [222] to that, Mr. Finkbeiner.

A. Whether it fits snugly so it can't fall out? Is that your question?

Mr. Graham: Yes.

A. It doesn't have to fit snugly to keep from dropping out because of the shape.

Q. But this one here fits in snug contact?

A. Apparently so.

Q. Now when the pipe that you have there with an unthreaded end is inserted the inner circumferential portion of the packing member, No. 4, fits snugly about the pipe, doesn't it?

A. That is right.

Q. When there is pressure in there the pressure backs up against the gasket and spreads the inner portion inwardly against the pipe; is that right? A. That is right.

Q. And it compresses the outer portion against the internal wall of the annular groove?

A. That is right.

(Testimony of E. A. Finkbeiner.)

Q. By the way, would you call that an internal annular groove in the sleeve? A. In here?

Q. Yes.

A. That is an annular groove around there.

Q. And when the water is in the pipe and that outer portion is [223] pressed outwardly against the wall of the groove then you have got even greater pressure than you have without the water in there; that is apparent, isn't it?

A. Will you repeat that question, please?

Q. I say, when you have a pressure of water in the pipe, when you have a pressure of water in a string of pipes where you are using this Exhibit 47 you have in your hand, and the water pressure is against the gasket then the internal portion of the gasket squeezes against the pipe that is inserted?

A. That is right.

Q. And the outer portion squeezes or presses against the inner wall of the sleeve?

A. That is right.

Q. And it presses more strongly or with more force than it did before there was any water pressure in there?

A. Your unit pressure is the same on both the inside and the outside.

Q. Beg pardon?

A. Your unit pressure is the same on the inside flange as well as on the outside flange.

Q. It is the same on both of them?

A. That is right.

(Testimony of E. A. Finkbeiner.)

Q. Now if that outer portion of that gasket were at a greater angularity so that it stood up straighter, wouldn't there still be a back pressure of that water just the same? [224]

A. A back pressure against your flange up here, you mean?

Q. Yes.

A. Yes, providing—yes, you will have your pressure on there.

Q. And it would be equal against the forwardly extending portion around the pipe and it would also have the same pressure backwardly against that portion you hold between your fingers which you term a flange?

A. You mean have the pressure along here as well as on the flange?

Q. Yes. A. That is right.

Q. And if you had a wall at the top of that flange and down the back of that flange; in other words, if there was no wall at all in front of that flange—in Exhibit 6, is it? A. 6, yes.

Q. If there were no wall at all in front of that flange and the pressure were the same wouldn't it seal?

A. It probably—it might; it depends on your fit.

Q. Now in all of your experience haven't you ever put in a packing of that kind? A. Yes.

Q. And it has sealed all right?

A. With pressure on there to hold it.

Q. Yes, with water pressure on there.

A. I mean with mechanical pressure. This flange

(Testimony of E. A. Finkbeiner.)

in here will hold much better if it is compressed to make sure your water [225] is not going over the top. You have got a space around here which permits your pressure to go over the top in the other side of the packing.

Q. That is true in any packing of that kind, isn't it? It is true with a round flange the same as with an angular type flange, is it not?

A. The same with what?

Q. It would be the same in Exhibit 47 that you have there, would it not, that the water could creep between the packing body and the internal wall of the groove?

A. It might.

Q. It might there too. Those are mechanical difficulties that would exist in any packing of that type; is that not true?

A. Yes. The construction on this is different from that, though.

Q. You qualified here as an expert in packing, and I am willing to accept your qualifications. Wouldn't that be true with both types of those gaskets?

A. You might get leakage around there.

Q. But the pressure of the water would have the same effect on both of them, of wedging them or pressing them against a resisting wall or surface?

A. That is right.

Mr. Graham: May I use the blackboard again?

The Court: Yes, go ahead. [226]

Q. (By Mr. Graham) Now I am not very good at drawing, but I will do the best I can. You are

(Testimony of E. A. Finkbeiner.)

fairly familiar with drawings and I presume know what cross sectioning means?

A. That is right.

Q. As I have drawn the sketch on the board here that would be approximately a cross section of Exhibit 6 that you have here? That would be true, would it not? This portion would be the sleeve and this portion would be the gasket?

A. That is right.

Q. Now if you take off the corner of that—you say that that is a flange? A. All right.

Q. As I originally drew it it had a flange. Now if you round the corners of that you would still have a flange, wouldn't you, if you made your metal casing to fit there? A. I think so.

Mr. Graham: Does your Honor understand what I drew?

The Court: Yes.

Q. (By Mr. Graham) You would still have a flange if that was a groove of that type, wouldn't you, instead of a square groove? A. Yes.

Q. And when you round your corners here to fit that groove you don't change the character of the object, do you? A. Just in shape is all.

Q. Just in shape; but it is still a flange, that circular sur- [227] face? A. That is right.

Q. All right. Then do you change the complete character of it if you cut a little piece out of there?

A. Absolutely; you bet.

Q. What remains of this portion here?

(Testimony of E. A. Finkbeiner.)

A. Well, you make a V or U type packing out of it.

Q. Forget the names. You don't have to call them by name. I am asking you about the character of that. Doesn't it still have a flange on it?

A. No, no.

Q. What do you call this?

A. When you cut that down in there you change the characteristics of that altogether.

Q. In other words, if that remains around there like that—we need not take the V-type or U-type or anything else.

A. All right.

Q. —when you cut that down to a round surface there you admit that that is a flange?

A. All right.

Q. All right. You put a slit in there, does that change the character of it?

A. Absolutely.

Q. By just putting a slit in there?

A. That is right. [228]

Q. It changes the character of it?

A. Yes, sir.

Q. What happens back here? Do you change the character of that?

A. What happens there is when you have that slit in there your water pressure is allowed to go in between there and it opens up your flange.

Q. It opens up the flange?

A. It comes back to a V-type.

Q. You mean to say that it opens up the flange so as to let the water in?

(Testimony of E. A. Finkbeiner.)

A. The pressure goes in there and expands that flange.

Q. Expands it here? A. That is right.

Q. If there is an opening here?

A. That is right.

Q. So that you would say, then, that that was a flange with a V opening in it?

A. All right. You can call it that.

Q. Well, isn't that structurally what it is?

A. Well, of course——

Q. You are an engineer. I am just asking you isn't that flange still there and hasn't the flange got a V in it?

A. Well, you are changing the structure——

Mr. Middleton: Just a minute, Mr. Graham. Let the witness answer. [229]

Mr. Graham: I am asking just a simple question.

Q. I am asking if you have removed the flange. Isn't it all there structurally? A. Well——

Q. I am not asking you "well"——

The Court: He hasn't finished. Give the witness a chance to finish his answer. He may start "well" or any way. Go ahead and answer the question.

A. When you put a slit down in there you change the characteristics of the shape, and as applied to gaskets you allow the pressure to go into your slit there and it makes a V-type gasket of it.

The Court: Do you change the function in any

(Testimony of E. A. Finkbeiner.)

manner, the function or performance, the manner of performance?

A. Sure, your performance is different because you have got a V-type in there, which makes the gasket perform altogether different than it did before.

The Court: What is the difference?

The Witness: May I step over there?

The Court: Certainly. Improve on his drawing if you can.

A. (Illustrating on blackboard) When you open up this flange here the pressure comes in there and it has a tendency to bend that back, and what you have really is a V-type gasket, which you don't have in a solid piece.

Q. (By Mr. Graham) In other words, if you have got this backed [230] up with metal——

A. Well, it is backed up with metal in any case.

Q. And you say that this then spreads up here?

A. Sure; that opens up. That is where you get your V gasket out of the thing.

The Court: I don't understand this opening up. The pipe passes beyond that.

A. No, your pipe is down here.

The Court: What?

A. Your pipe is down here.

Mr. Graham: This is the sleeve, if your Honor please. The pipe would go through here. The inside pipe, the unthreaded pipe, would go through here.

The Court: All right. Well, pressure in the in-

(Testimony of E. A. Finkbeiner.)

side pipe, doesn't that close the two parts of the V shape?

A. Your Honor, when you get pressure in there—excuse my back—the tendency is to shove this down and seal this pipe around here.

The Court: All right.

A. When you have got pressure—when you have got a slot in here the pressure is going to go in there and tend to open that up and seal this up here, the same as you have got in a V-type gasket. In other words, it makes a V-type gasket out of it.

Q. (By Mr. Graham) And presses it up here pretty tight, doesn't [231] it, if you have got reasonable pressure?

A. Depending on your pressure.

Q. Well, what pressure do you use, say, in irrigation?

A. Oh, it varies. It varies on irrigation.

Q. What is your experience?

A. Well, over in Idaho they go up to five or six hundred feet. In various parts of the country around here in the Willamette Valley it is all low head pumping.

Q. Thirty or forty pounds?

A. Oh, they have a lot of it that is five or ten pounds. Along the river where the valley is flat they don't get much pressure in pumping projects down there.

Q. Then under low pressure that would not open up and under high pressure it would open up?

A. It would open up under any pressure.

(Testimony of E. A. Finkbeiner.)

Q. When it does open up it correspondingly seals against this circumferential groove up there?

A. It raises this up here and your seal would be up here, you see.

Q. Your seal would be up here?

A. That is right.

Q. It would press this upper portion above the slot against the top wall of the groove and it would press the back wall of the gasket against the back wall of the groove?

A. Well, you are going to have—theoretically, what happens is [232] your pressure comes in here and your pressure opens up and the tendency is to open that up radially.

Q. Your tendency is to open it up radially, yes. But when that opens up radially you get an increased pressure up over the top of your groove and you also are having presented to the pressure a wide area of this member to get the pressure back against this back end of the groove, don't you?

A. Well, when you get your pressure in here that throws that out radially.

Q. Yes, you have said that several times.

A. And it does not tend to throw it this way, but you have got an unbalanced pressure here which may throw it in this way. If you made a cut like this the chances are it would blow out.

Q. You mean I have got too much space here?

A. That is right.

Q. Well, I can accommodate that all right.

The Court: Recast it now.

(Testimony of E. A. Finkbeiner.)

Mr. Graham: I said I wasn't very much of a draftsman.

Q. But there would be pressure back this way against this wall?

A. Well, I think what happens there is this clamps on here and this clamps up there. You see, you have got your pressure in here which clamps onto that pipe, and there is a lot of friction there that holds that. In the same way you go up here and you get friction up there. There would be your points of opening up here and down along here (indicating on blackboard). [233]

Q. I see. You get frictional holding along here; is that the idea?

A. Well, you would get it coming over to here, yes. You can't get it over there because here is where she bends in here, where you get pressure on the inside.

Q. And then the other holding would be frictional pressure up here at the top?

A. No, in here at the mouth of your slot and a little straight up.

Q. So that you would get a frictional pressure up there at the top, then?

A. At the top, due to forcing that out.

Q. And that frictional pressure would hold the gasket in that annular groove?

A. That holds that there, yes. It holds it tight. It makes your seal.

Q. Now if you cut off that corner there you

(Testimony of E. A. Finkbeiner.)

would get your pressure back here, wouldn't you, against that wall?

A. You mean cut that corner off entirely?

Q. Yes. I kind of mauled that one up. Let's start on the other end. Now we have got our casing all connected up again. Here is your casing and here is our flange (illustrating on blackboard). Now if we cut that wall off there, cut the casing off there, you would get a back pressure against this flange here, wouldn't you? [234]

A. You mean just cut off this corner all the way around?

Q. Yes, just cut it off.

A. And leave this open here, or is this open all around here (indicating)?

Q. I don't want to draw one line on top of the other. That is supposed to fit.

A. All right.

Q. You cut off that corner that I have indicated in white. A. All right.

Q. You would get back pressure against the flange of the gasket or packing member, wouldn't you?

A. Yes, if you had water pressure on there, or whatever it was.

Q. And that would force that back against the back wall and make a seal?

A. Well, of course—that is theoretical, yes. If this is not a good fit around here, though, your water is going to run around here and you will have pressure on both sides.

(Testimony of E. A. Finkbeiner.)

Q. Well now, would not ordinary mechanical skill and intelligence dictate that you make a tight enough fit there to prevent water going through for the purpose of a packing?

A. Yes, but your gasket is not a machine fit.

Q. Wouldn't that happen with this type of gasket that you have shown around here? Wouldn't the same thing happen there? A. It would.

Q. If it did not fit it would leak? [235]

A. It could if it was made like that.

Q. Isn't that right? If it did not fit it would leak and if it did fit it would not leak?

A. No.

Q. So that the same would apply down here; isn't that a fact? A. That is right.

Q. If you get pressure back here you would get a sealing against the wall here, wouldn't you?

A. Of course, understand I would not recommend a section like that.

Q. I say, I am not a very good draftsman.

A. But I mean that is not a good section for a gasket. You taper this off here to get—the purpose of a gasket—you taper this off so it fits, and the same way out here, and the idea is to get the pressure back of that and it is flexible and holds it out; holds it out and in——

Q. In other words, if you were going to make the gasket yourself you would make the free circumferential part around the unthreaded pipe and thinner relatively?

(Testimony of E. A. Finkbeiner.)

A. Relatively thinner, and the same way on the top.

Q. You would make the top relatively thinner, but mechanically it would function in the same way but in a different degree? A. Well—

Q. Better, but the principle of operation would be the same?

A. Well, you could hardly call that a proper design, because [236] what you have got there is just a big lump, and you cut a slot in it, and that is not the way to get a gasket. What you want to get is a thin member out here the same way.

Mr. Graham: I don't know what the exhibit number is, your Honor, that I want.

The Court: Which one do you want?

Mr. Graham: It looks like the one that has the section cut out of it.

Q. Now referring to the exhibit that you have in your hand, which I believe is Exhibit 81—

A. 81-B, yes.

Q. When that gasket is in operation with that pipe there there isn't any V in it, is there?

A. No V?

Q. Yes.

A. This seems to show a very distinct V to me.

Q. You mean that slit? A. No, in here.

Q. You mean that slit? A. Yes.

Q. It is closed, isn't it? A. No.

Q. What? A. No.

Q. How wide is it open? [237]

A. Oh, on the outside an eighth of an inch.

(Testimony of E. A. Finkbeiner.)

Q. Will you let me look at the exhibit. At the outer wall it is open about an eighth of an inch; is that right? A. That is right.

Q. At the rear of that opening it is a mere slit?

A. That is right.

Q. How far back is it open an eighth of an inch?

A. Oh, that runs back there, starting at an eighth of an inch, it tapers back about a quarter of an inch.

Q. About three-quarters of the gasket there is simply a slit, isn't it?

A. Without any pressure, yes.

Q. Yes. But that gasket was opened wide in Exhibit 4, wasn't it? A. You mean here?

Q. Exhibit 4, what you spoke of as the V in the gasket is open wide, isn't it?

A. That is right.

Q. And when the pipe is inserted in there that is no longer a V, is it? A. It is still a V.

Q. You call a slit a V?

A. No, I don't call it a slit because it is a perfect V right there on the edge of that for a quarter of an inch.

Q. Just on the edge?

A. Back for about a quarter of an inch. [238]

Q. And the entire rest of it is all slit?

A. Well, let's see. I don't know whether that is open or not. My eyes aren't good enough for that. Well, I would not say it was closed.

Q. But it is such a small opening that you have to take your knife blade to even feel it or see it?

(Testimony of E. A. Finkbeiner.)

A. It is compressed there, yes.

Q. You insist, then, that that is a V-type of opening?

A. Absolutely.

The Court: Of course, if you move the pipe it opens up automatically wider?

A. It opens up?

The Court: Yes.

A. Yes, it opens up more.

The Court: It is a flexible joint?

A. Yes.

The Court: On the other hand, if you turn it the other way it will open below, it will open on the other side and press tight. If that were immobilized there would be very little of the V left; it would just look like overlapping lips pressed tightly against each other and then the whole against the groove; wouldn't that be correct?

A. If I press it over there fully—if I press that over there as far as I can I still have a little V there, you see. If this one is opened up wider, you see— [239]

The Court: That is what I was thinking.

The Witness: You see, that groove—the V shape depends on the position of this. If you put it over to one side it opens up pretty nearly down to the bottom. If you center that pipe you get a V on both sides.

The Court: If you enlarged that pipe you would probably press it so there would be no V left?

A. Then you would not get it in here.

(Testimony of E. A. Finkbeiner.)

The Court: Then you could not have a loose joint, flexible joint?

A. No, you would not have any flexible joint.

The Court: All right.

Mr. Graham: That is all.

Redirect Examination

By Mr. Middleton:

Q. The question was asked you, Mr. Finkbeiner, in reference to the U-shaped packing as to what you call the various sides of it or parts of it. Is the U-shaped packing, Exhibit 4 there, made up of two or more parts or is it one entity?

A. Exhibit 4 is made of one part.

Q. Any reference then to various portions of the exhibit or parts of the exhibit is relative only in position; is that right?

A. That is right.

Mr. Middleton: That is all. [240]

Mr. Graham: That is all.

(Witness excused.)

(Short recess.)

GEORGE F. McDOUGALL,

a witness produced in behalf of the defendants, thereupon resumed the stand and was further examined and testified as follows:

Direct Examination (Continued)

By Mr. Middleton:

Q. Mr. McDougall, will you please refer to Ex-

(Testimony of George F. McDougall.)

hibit 81-B, and I will ask you whether or not that Exhibit 81-B has the same structural characteristics as Exhibits 47 and 48 excepting only for the difference in the locking means.

A. As far as the sleeve is concerned it is double, each of which is the full equivalent of the sleeve in Exhibit 47 and 48. There are two pipes with unthreaded ends and one inserted in each of the sleeves so that it is the same as those exhibits except that it is double as to the essential parts.

Q. Except as to the locking means?

A. Except as to the locking means, yes.

Q. And does or does not that locking means in Exhibit 81-B operate hingedly within the meaning of that term as it has been employed in this lawsuit?

A. It does. [241]

Mr. Middleton: You may cross examine.

Cross Examination

By Mr. Graham:

Q. I believe you testified, Mr. McDougall, that "frictionally held" means resistance to motion.

The Court: Can you hear, Mr. McDougall?

The Witness: I didn't hear that clearly. Especially cross examining questions I must hear clearly. If the reporter will read it.

(Last question read.)

A. No, I said friction is resistance to motion.

Q. (By Mr. Graham) Would you say that a tight binding fit produced a frictional holding?

A. If the gripping effect is sufficient to prevent

(Testimony of George F. McDougall.)

motion under the force applied then it is frictionally held.

Q. And a packing member that was under water pressure in a pipe line would have pressure, would it not, resulting in force?

A. The packing member such as we have been considering in this lawsuit here; that is, the cylindrical portion of the flange packing and both portions of the V packing, when hydraulic pressure is applied to them one expands into contact with the inside wall of the bell and the other is compressed around the pipe, but no friction can occur unless there is relative motion, and if there is a tendency to relative motion then friction will either resist it or yield to superior force. [242]

Q. Now is there any motion in the packing member in the Lanninger patent?

A. There is no motion unless the pipes tend to move longitudinally or axially, and consequently there would be no friction as between the free cylindrical portion and the pipe. And as I explained in my direct examination, the words "frictionally held" are not very apt. It is not misleading, but it should be "grippingly held".

Q. But his intent, then, is that it is held by some means other than bolting?

A. Not necessarily. These exhibits that we have here—you have no exhibits, pardon, but that figure in the drawing that shows that the two parts of the groove are made narrower by screwing together to contain the sides of the flange grippingly,

(Testimony of George F. McDougall.)

now it is still true, I think, to say that they are frictionally held, but you can apply—it is still true to say they are grippingly held, but the change is only as a matter of degree. Where they are tapered and forced in, why, they are held there somewhat like a cork is held in a bottle.

Q. Sort of by pressure?

A. Well, it depends on the taper. If the taper is too much they won't stay at all. When they are pressed in there they are grippingly held, but friction will result only when you try to move them, of course.

Q. You would say that as I hold this pencil between my fingers it [243] is frictionally held?

A. No, I would say it is grippingly held.

Q. Grippingly held?

A. But it means if you take hold of it with your other hand and overcome it with your other fingers then friction results. Friction is resistance to motion.

Q. In other words, if I move this pencil then it is frictionally held?

A. No, it is still grippingly held, but only partially. Friction results—you use just as much power as there is friction at the other end to move the pencil.

Q. But in neither the Lanninger patent nor in Defendants' Exhibits 47 and 48 is there a sliding or longitudinal movement of the radially extended portion, whether you call it a flange or rim?

(Testimony of George F. McDougall.)

A. Not necessarily. But as the pipe lays on the ground when you force cold water into it it will contract. There will be some relative motion. It may be small, but it is there. You can shut the water off, the temperature rises and there will be relative motion again. A motion between two grippingly held surfaces always involves some friction.

Q. Well, that is just more or less theoretical rather than practical, isn't it, in amount?

A. No, it is not theoretical. It is actual enough.

Q. It is what you call thermal expansion and thermal contraction? [244]

A. Thermal contraction or thermal expansion has the same effect, as far as it goes, as taking hold of any chain and pulling it—

Q. Now that makes it move radially inwardly and radially outwardly, does it not?

A. That has no effect on the radial characteristics of the packing. Any longitudinal movement would not have any effect on the packing itself as to making it expand or contract.

Q. But it is not a function of the packing member in either case—

A. I didn't hear you.

Q. It is not an operative function of the gasket in either case, either of the patent or of the defendants' devices, to move longitudinally?

A. It is not a function in the sense that it is a desirable mode of operation, but it is one of those necessary things that are going to occur anyway and you can't prevent it to a certain extent.

(Testimony of George F. McDougall.)

Q. Did you, Mr. McDougall, write the Pierce patent application that resulted in Patent No. 1,945,293?

A. I don't recall the number. If I did, why, you will find my name signed under the drawing.

Mr. Graham: I am offering the Pierce patent, Defendants' Exhibit 22, in evidence for the specific purpose of impeaching the witness; not for the purpose of anticipation or showing a patentable difference, for which it was excluded previously.

(The copy of Patent No. 1,945,293, Ralph H. Pierce, [245] so offered, having been previously marked Defendants' Pre-Trial Exhibit 22, was marked received as Plaintiffs' Exhibit 22.)

[Printer's Note: Plaintiff's Exhibit No. 22 is set out in full at page 387 of this printed record.]

Q. Will you please refer to Exhibit 22, the Pierce patent.

A. Yes. I have the patent and the drawing bears my signature.

Q. You prepared the application?

A. Yes, sir.

Q. Now is the packing member in Exhibit 22 which you have in your hand substantially similar to the packing member in Defendants' Exhibits 47 and 48?

A. In principle it is the same thing.

Q. Now will you please read column two beginning at line 84 of Exhibit 22.

(Testimony of George F. McDougall.)

A. Give me those figures again.

Q. Column two, beginning at line 84.

A. Beginning at line 84, beginning about the middle of line 84?

Q. That is all right.

A. "The cup-rubber pocket, 5, will have an internal surface that is an arc of a circle, preferably somewhat less than a half circle. The cup-rubber, 8, is shown in Figure I to hug the inside of this circular arc closely but it is not molded on that part of its surface to a uniform circular outline. That part of it, shown in Figure III and designated by the arc, A, is made to a longer radius than that part of it designated by B, the arc B being made to the same radius as the inside of the [246] cup-rubber pocket, 5, will lay in the pocket very smoothly, while that part represented by the arc A requires some compression and therefore the lip, 8a, is bent down as shown in Figure I and tends to make a preliminarily tight joint at this point while pushing the arc A firmly to its seat." Is that far enough?

Q. Yes. Then the outer and arcuate portion of the packing member—

A. I am having difficulty in hearing you.

Q. Then the outer arcuate portion of the packing members in Exhibits 47 and 48 are formed each half in a different radii?

A. Yes, there is a composite arc.

Q. And that is for the purpose so that one portion will push the other portion firmly to its seat?

(Testimony of George F. McDougall.)

A. If I can have this section here I can show you precisely what it means, because it actually—these rubber packings are made just that way.

Mr. Graham: May we use a whole packing there, if your Honor please? We have got an exhibit there of a whole packing.

Q. Can you use a whole packing for that?

A. You can't use a whole packing for it very well because you can't see inside, I don't think. If we put this packing in here, in this cup-rubber pocket, as it is called in the patent specifications, you see it distorts because it is a little bigger than the pocket. It is made that way purposely so that it ex- [247] pands tightly into place. You can't get a view of it, you see.

Q. Then the packing member that is made for that bell, as you call it, is made larger than the diameter of the bell? A. Slightly larger.

Q. So as to make it tightly fit in the seat?

A. So it makes a tight fit in there. It compresses slightly in putting it in. Now if we take this three-quarter member,—I think that will do,—that, on the other hand, is distorted by having a piece removed from it so that you don't get the effect with the sectioned piece. And we will take the bell half of Exhibit 47, I think it is, and by removing the unthreaded end of the pipe, or the blank pipe, and looking up in between, into the V, it can be seen that the outer edge corresponding to the section that I am laying my finger on here in this piece hugs the wall, the inside wall, of the

(Testimony of George F. McDougall.)

bell tightly. That is the purpose of making those of a composite arc as described in the patent, so that it is initially tight. When water comes in there as practically zero pressure, we will say, when the pipe fills half full, there would not be any pressure in there but it still will not leak. I think I have answered your question.

Q. Pardon me. Were you going to say something else? A. Beg pardon?

Q. Were you going to say something else?

A. No, I say I think I have answered your question. [248]

Q. The packing member is originally made a little larger than the annular recess in the sleeve?

A. The specifications say that the cup-rubber, 8, shown in Figure I is fashioned to hug the inside of the circular arc closely. That was the intention, that it should not necessarily be measurably larger, but it should be a good snug fit. The easiest way to do that would be to make it just a trifle larger, of course.

Mr. Graham: May I illustrate a point on the board here, your Honor?

The Court: Yes.

Q. (By Mr. Graham) Then you make the arc of the sleeve concentric to a point?

A. I don't know whether he did do that. It is shown that way in the drawing. But I have never checked one of these, and I don't know how they are actually rolled.

(Testimony of George F. McDougall.)

Q. But that is the intent, isn't it? They try to do that?

A. I think so. I have never conferred with them about it.

Q. Then which is the arc of longer diameter, that one or this one (indicating on blackboard)?

A. You are talking about the——

Q. The sleeve. This is the sleeve.

A. The sleeve?

Q. That is the sleeve.

A. That doesn't show that sleeve. It says the rubber.

Q. Yes. Then the rubber member comes in here (indicating). [249]

A. Yes, the rubber member comes inside there. That is a very good designation of it.

Q. Something like that (indicating on blackboard).

A. It is disproportionate. Your drawing is very disproportionate, but in principle——

Q. Yes. Now which of these arcs is the larger, that arc or this arc?

A. The forward arc; that is, the one nearest to the edge of the V is the one with the longer radius.

Q. That has the longer radius? A. Yes.

Q. When you say that one portion presses the other portion to a firm fit you mean that this portion here of the arc with the larger radius presses this portion of the arc having the smaller radius against——

A. No, that is not what it says.

(Testimony of George F. McDougall.)

Q. What does it say?

A. What it does say is that this lower leg of the V here extends down into the pipe somewhat. That is shown at 8c in Figure I of the drawing.

Q. Will you point to the lower leg of the V.

A. (Indicating) Yes, that extends down into the pipe. Now when the pipe is inserted it finds an opening here a little bit like that, so that this being a long radius it perhaps touches here, but not in the center; and then when you push the pipe in [250] it forces that up in and closes that circle so that they are concentric.

Q. And that arc being larger has more pressure against the wall of the sleeve?

A. No, the purpose of making that in that way is to have an initial seal of the lip against the wall, the inside wall of the bell, so that it will be tight at zero plus, a very small fraction of pressure.

Q. In any event, this arc, whether it be a single radius or double radius, fits snugly into that arc you have formed there, whether you call it a bell or a groove?

A. Under pressure it does, yes.

Q. When the pipe is inserted this lower lip, as you call it, is pressed up so that it presses that arc more tightly? A. It tends to close it, yes.

Q. Against the sleeve? A. Yes.

Q. Now you have testified to prior art patents that antedated the Lanninger patent.

A. I remember some of it, yes.

(Testimony of George F. McDougall.)

Q. Now in drawing the Pierce patent, Exhibit 22, will you read what you said relative to the problem and the art? A. Relative to what?

Q. Relative to the problem and the prior art, at column one, line 15. [251]

A. "The problem here involved is many years old and many attempts have been made to solve it; a very successful coupling so far as tightness is concerned is made on the stuffing box principle having bolts to tighten a rubber ring and compress it around the pipe. It is, however, expensive to build and difficult to properly tighten in a trench." Is that far enough?

Q. Now read down to line 30.

A. Line what?

Q. Read down to line 30.

A. Very good. "Before my new invention, so far as I am aware and as I believe, all joints heretofore made by cup-rubbers, to coin a word, that is to say rubbers that depended upon the internal pressure of the contained fluid to make them hug the pipe, have been commercial failures for the reason that if the cup-rubber was made enough smaller than the pipe it was to encircle so that the original grip of the rubber on the pipe would result in a tight joint then it was practically impossible of assembly in the field, and conversely if made so that the pipe could be readily inserted within it in the field, then it would invariably leak until the pressure reached a very considerable

(Testimony of George F. McDougall.)

amount and began to have its effect toward making the rubber grip the pipe.”

Q. Then there was a very decided problem to overcome at that time? [252]

A. You must remember that that material is always furnished to the patent attorney by his client, the man who has done the inventing. He is the man that knows what he invented. He is compelled to tell what it is. And while the language may not be precisely his, the thought always is if a patent attorney does his duty. Just how that particular paragraph came to be written I don't recall at this time, except as to my general practice, that it follows the instructions of my client in every case.

Q. Yes. And you used the term “cup-rubber” in here, did you not, for the packing member?

A. Beg pardon?

Q. You used the term “cup-rubber” in here for the packing member?

A. Yes.

Q. You don't call it a U-packing?

A. I didn't there, no.

Q. You don't call it a V-packing?

A. I didn't there, no.

Q. You call it a cup-rubber?

A. Yes. That was also a term that was furnished by my client. I used his language so far as it was apt.

Q. And he furnished that to you?

A. Yes.

Q. And you furnished it in the patent?

(Testimony of George F. McDougall.)

A. Yes. [253]

Q. Well now, doesn't the Lanninger patent speak of the gasket or packing member—

A. Will you please speak a little louder?

Q. Doesn't the Lanninger patent speak of the packing member as a cup-rubber?

A. It may or may not. I don't recall.

Q. Now you testified that the Lanninger patent had a flange clamped in the groove of the sleeve.

A. Will you speak a little louder?

Q. The Lanninger patent, according to your testimony, has a flange clamped in the groove of the sleeve.

A. Has a flange that extends into the groove of the sleeve, yes.

Q. You testified that it was clamped.

A. What?

Q. And you testified that it was clamped?

A. It is shown clamped.

Q. In one of the figures it is shown as clamped?

A. Yes.

Q. In all the other views it is shown not clamped; is that correct?

A. I believe that is correct.

Q. Would it help you to have the Lanninger patent handed to you?

A. I might also add that I questioned the success and utility of those where it is not clamped.

Q. Now in all of the other figures except Figure 3 it shows a packing member held without being clamped, does it not? [254]

(Testimony of George F. McDougall.)

A. Well, in Figures 2 and 5 it doesn't show how it is held. Those are cross sections.

Q. Yes.

A. But in Figures 1 and 4 the packing apparently fits into a groove.

Q. Then in his drawing he indicates two ways of holding the packing in there?

A. In the drawing he does indicate two ways, yes.

Q. And he states in column 2, line 85, that the packing could be adjustably mounted in the sleeve by means of clamping the two parts on it; is that correct?

A. It doesn't read just that way. "The packing 'b' could be adjustably mounted in the casing 'a' as shown in Figure 3. In this case the sleeve and neck are composed of two parts 'a', 'a₁' between the adjacent threaded ends 'p' of which the flange 'b₂' of the cup shaped packing is clamped."

Q. In other words, it could be fixed that way?

A. Yes.

Q. But that does not mean that it is the only way?

A. Oh, certainly not. That was just my opinion, that it was the only successful way.

Q. I believe you testified that Defendants' Exhibits 47 and 48 did not have an internal annular groove; is that correct?

A. Did not have an internal annular groove?

Q. Yes. [255]

A. I testified that they did not have an internal annular groove in the sense that the term was em-

(Testimony of George F. McDougall.)

ployed in the Lanninger patent. That was qualified in that way.

Q. But it has got an internal annular groove?

A. It is not a groove.

Q. In one sense?

A. Well, it is an internal annular bead of a substantially semi-circular section.

Q. Under no circumstances would you call that an internal annular groove?

A. It could be called a groove, yes, and still be correct; but it is not a groove in the sense that the word "groove" is being employed in this lawsuit. I made that distinction for that reason.

Q. Now you prepared the claim in the Pierce patent, didn't you?

A. I prepared the claim in the Pierce patent, yes.

Q. And prosecuted it through the Patent Office?

A. Yes.

Q. Now will you read the first few lines of that claim.

A. "In a pipe joint, a sleeve member, an annular internal semicircular section groove in said sleeve member."

Q. A semicircular section of a groove?

A. Yes, yes.

Q. And it is internal?

A. Yes, it is internal. [256]

Q. So that wouldn't you concede that that was a groove?

A. That is still true, but as I pointed out to you just a moment ago, I made that distinction in my

(Testimony of George F. McDougall.)

direct testimony that these two exhibits did not have a groove, an internal annular groove, of the kind and type meant in Lanninger, which is a rectangular cross section. I wished to make that distinction and do yet.

Q. Now the devices of Exhibits 47 and 48 are made of thin metal, aren't they?

A. Thin metal?

Q. Thin sheet metal?

A. Yes, apparently they are. I think they are made of seamless pipe.

Q. They are made by a process of swaging, aren't they, with rollers?

A. I never saw them made. I don't know. I understood they were made by rolling.

Q. By rolling the metal? A. Yes.

Q. Into shape; what some people call spinning?

A. Beg pardon?

Q. What some people might call spinning metal?

A. No, it is not spinning. I don't know what it is. As I say, I never saw them made.

Q. Well, it is not cast, anyhow?

A. It is not cast. [257]

Q. It is formed metal rather than cast metal?

A. Yes; I think cold worked metal would be a better word.

Q. You could not make the Lanninger groove by rolling or forming the metal that way, could you?

A. Well, it would be a brave man to say you can't do anything in metal working nowadays. I have never seen it done, but I doubt it.

(Testimony of George F. McDougall.)

Q. You have never seen a groove with those sharp angles spun in mass production?

A. I have never seen it done, but they do some surprising things nowadays in metal work, and I wouldn't be brave enough to say that it could not be done.

Q. As an engineer, in order to make this out of thin gauge metal for commercial production, making it cheap, you have got to have a larger groove comparatively than shown in the Lanninger patent?

A. Not necessarily. The size of it doesn't cut much figure.

Q. You could roll and shape an annular groove like that or form it out of thin sheet metal?

A. I don't know, but I say I would not say it could not be done.

Q. As an engineer wouldn't you know that?

A. What?

Q. Wouldn't you know whether you could spin out sharp angles of that type or swage them out?

A. I know that modern metal work, which I have not been directly connected with for the last several years, has made such advances that my opinions as to what could be done and what could not be [258] done would not be of any particular value.

Q. Yet you testified that that is not a groove in the meaning of the Lanninger patent?

A. I did; yes, sir.

Q. But you don't know what purposes may have prompted them to make——

A. Beg pardon?

(Testimony of George F. McDougall.)

Q. You don't know what purposes of manufacture or necessities of manufacture may have prompted them to make this groove larger?

A. You mean the one in——

Q. In Exhibit 47?

A. Oh, well, that was made larger purposely, to carry a U-section packing or a V-section packing, as you might call it. They are both the same thing.

Q. You don't use the same term as the Pierce patent, I notice.

A. What?

Q. You don't call that a cup rubber?

A. Cup rubber is not the technical name for it, but what it is is a V packing. What is actually used is a V packing. That was a good many years ago, when that "cup-rubber" was put into the patent, and its origin has escaped me.

Q. You testified that in order for a member to be a flange on a packing it must be held by metal?

A. It must be what?

Q. It must be held by metal; isn't that what you testified? [259]

A. In order to be useful it would have to be. I don't remember that testimony, but I am willing to say now that in order to be useful the flange must be held between two metal surfaces.

Q. For the purpose of the question let's call that internal annular recess a groove.

A. All right.

Q. Hasn't it a forward wall and a rearward wall?

A. I understand what you are driving at. Yes, sir.

(Testimony of George F. McDougall.)

Q. I say, that so-called groove has a forward wall and a rearward wall? A. That is correct.

Q. And it has a top wall? A. Necessarily.

Q. And doesn't the radially outer portion of the packing member in Exhibits 47 and 48 fit in between that forward wall and rearward wall and top wall?

A. Well, the top wall and the forward wall and the rear wall are all one thing in Exhibit 47. It is just the arc of a circle, a little less than a half circle, I would take it from looking at those exhibits. You can't distinguish where one portion begins and the other one leaves off. It is just an arc of a circle.

Q. But there is a rearward wall?

A. There is a rearward portion.

Q. And a forward portion and a top portion?

[260]

A. And a top portion.

Q. And there isn't any angle between?

A. There is no angle between them; that is correct. They are arcuate and I think a continuous arc through a single radius for it.

Q. Now with regard to Exhibit 47, which you have right there, I believe you testified that that was a bayonet joint.

A. That is a common designation for that type of joint. It is called a bayonet joint. It originated, as I understand it, because originally the old bayonets were fastened onto a gun in that way. They were inserted and they turned them down. Some of them had two motions.

(Testimony of George F. McDougall.)

Q. But bayonets fastened on the end of a gun were provided with a rigid lock, were they not?

A. They had a locking means.

Q. They did not have flexibility?

A. They had a rigid locking means independent of that. But this type of a joint, where you insert one part, such as a hook, through a notch and then turn it relatively to make them inseparable longitudinally, they are always called bayonet joints, and the degree of the fit hasn't anything to do with it.

Q. But the bayonet joint does not provide flexibility of the two members of the joint?

A. The original bayonet joint rifle did not, but I am just telling you that for your information; that that type of joint is always [261] called a bayonet joint and that is irrespective of the fit.

Q. But it is something more than a bayonet joint because it provides relative movement of the axis; it permits relative movement of the axis of the two pipe members, does it not?

A. This one does, yes, this particular one. Exhibit 47 does not impair the movable parts because it affords more lost motion than is found between the blank pipe and the bell, and still it locks it against separation.

Q. Yes. It secures them against coming apart under pressure of irrigation; is that it?

A. Yes.

Q. Do you know, Mr. McDougall—this is not cross examination, but I am asking for the information of the Court—

(Testimony of George F. McDougall.)

The Witness: A little louder, if you please.

Q. I say, this is not cross examination. I am asking for the information of the Court. How long are the pipes that they hook onto the end of these coupling members?

A. Oh, the standard length of pipes?

Q. Yes.

A. I don't know, but a good many feet, ten or twelve; maybe sixteen or twenty; I have no idea. But they are naturally as long a pipe as a workman can conveniently handle, because pipe costs less than couplings.

Q. They are quite long?

A. Oh, yes, quite long pieces. [262]

Q. Approximately how much swing would it give to the opposite end of the pipe when you had this kind of a coupling like Exhibit 47?

A. Well, that is merely a problem is angles. Now if that has about a three-degree angularity there, which it looks like it had, why, if the pipe was 12 feet long there would still be that three degrees, but the sine of that angle would be longer than the sine of a 10-foot length of pipe and shorter than a 16-foot length of pipe. It is the sine of the included angle. If you wanted to go around a circle you could pick out shorter pieces of pipe.

Q. I am not much of an engineer. May I ask you whether in the average length of pipe, we will say 16 feet, you do allow a lateral swing of 3 feet or 4 feet?

A. Not in one length, I don't think.

Q. Approximately how much would it be?

(Testimony of George F. McDougall.)

A. Well, I would have to have a slide rule or something here to figure it up.

Q. That is all right. Thank you. Now referring to Exhibit 49 and also referring to Exhibit 70, have you ever tried the devices similar to Exhibits 49 and 70 in operation?

A. Have I ever seen them?

Q. Yes. A. No, sir.

Q. Have you ever tested them under pressure?

[263]

A. No, sir.

Q. Then your testimony this morning as to how they would operate is merely based on your expert opinion? A. That is correct.

Q. You testified relative to the Gorter patent, Exhibit 32, No. 580,084. Here is an enlargement of it. Have you read the description of that Gorter patent, Exhibit 32?

A. Some time ago I did.

Q. Now is there any description in the specifications of the Gorter patent that mentions any flexibility or hingability of the joint?

A. Is there any such thing there?

Q. Yes. A. I don't know.

Q. In the description? A. I don't know.

Q. Could you refer to the Gorter patent, Exhibit 32, and tell us?

The Court: Is there a question pending?

Mr. Graham? Yes, your Honor. I wanted to know whether there is anything in the Gorter patent

(Testimony of George F. McDougall.)

which discloses any hinged relationship of the two portions of the pipe shown in the drawing.

A. (Referring to exhibit) I don't find anything.

Q. And from the drawing it is perfectly apparent that it is a rigid joint so far as lateral movement from the axis is concerned?

A. That, however, is a matter of degree, you know. Any joint that is insertable in another joint necessarily has a degree of lateral play. It may be made very close where it is not required. We have two examples of Lanninger here. I don't know who made them. This one shows almost no lateral motion at all.

Q. Which one shows no lateral motion at all?

A. That is marked 49-A, and then you have one marked 70, and it has a very considerable lateral motion in almost all directions. That, however, is merely a matter of degree.

Q. Now coming back to the Gorter patent, it is shown as a tight fitting joint of metal to metal contact, isn't it? A. What is it?

Q. I say, coming back to the Gorter patent it shows a tight metal to metal contact?

A. Where?

Q. Of the parts in the drawing. Take Figure 1.

A. Well, of course there is always metal to metal contact. There is metal to metal contact in any of these. You say that one is a smooth fit or a running fit or a loose fit or a tight fit in respect to the cylindrical members.

Q. Let me change the question. How would you

(Testimony of George F. McDougall.)

describe the fit between the two pipe members in Figure 1 of the Gorter patent?

A. I would not undertake to describe them because the drawing [265] contains no dimensions and the specifications say nothing about it. However, taking the use of it, it is intended more for a swivel joint than anything else, and I would say they probably made it a running fit.

Q. What do you mean by a running fit?

A. One that will turn smoothly without any particular chatter or vibration.

Q. That is, rotate on its axis?

A. Rotate radially on its axis.

Q. And not move laterally relative to the other pipe?

A. Not probably to any considerable extent. That, however, is a question of purpose, Mr. Graham, and degree.

Q. And the patent of Gorter did not have that purpose; is that the idea?

A. The fact that Gorter didn't say anything about it would indicate that he didn't attach much importance to it.

Q. Now I understood you to testify relative to the Anderson patent, No. 811,812, Exhibit 40—

A. I have the patent now.

Q. —that it related to standpipes for railways.

A. Yes.

Q. Now is the manner of use of a standpipe for railways the same as it is in irrigation for showering crops?

(Testimony of George F. McDougall.)

A. In one case you irrigate the ground and the other the locomotive tender, but you are conveying water through it. To that extent [266] it is similar. I heard Mr. Finkbeiner testify to something I was not familiar with as to the pounds of pressure used in irrigation. They are much lower than I thought they would be. And I know that when they open up one of those standpipes, which I have seen done many times, usually the water comes down out of the tank that extends up—the bottom of it probably 20 or 25 feet above the ground—you pull the valve wide open and I should say there would be three or four pounds, possibly, pressure to the square inch there.

Q. It is all a downward flow, isn't it?

A. What is it?

Q. It is always a downward flow?

A. No, no; on the contrary it is not. The flow is practically always upward. The pipe comes down to the ground and is laid underground probably to a convenient point alongside the track,—you see that very clearly illustrated in Figure 1 of the patent,—and then the pressure comes up, comes up with considerable velocity, and then it turns at right angles, which would produce a measurable pressure indeed on that flexible joint.

Q. However, when the pipe is in use and that water comes up there is no back pressure on that water, is there?

A. How do you mean, back pressure?

(Testimony of George F. McDougall.)

Q. Well, it has ceased its upward movement when it strikes the packing member in the joint, hasn't it?

A. If you will notice, those pipes are all tapered, and this [267] one is shown tapered, and it is shown to have a nozzle at the end of it that makes a 90-degree elbow. Whenever they throw those big valves wide open there is considerable pressure there. There may be two or three or four pounds pressure. It is a measurable pressure, in any event, comparable to the pressures Mr. Finkbeiner said they used in this spray irrigation; perhaps lighter, but it is a pressure, nevertheless.

Q. What do you mean? Comparable to which figure? I believe he expressed something like as low as 10 pounds in some places around this territory and as high as 80 pounds in other places.

A. Well, I know, but I thought I understood him to say in places they used three or four pounds. I might have been mistaken. But there could easily be more than 10 pounds on this from hydraulic shock, you know, when you throw that valve open and the water starts up there and begins the right angle turn. The hydraulic shock would run the pressure as high as 25 pounds without any trouble at all.

Q. Now I refer you to Figure 4 of the patent. Figure 4 refers to an enlargement of the right angle joint in Figure 1, does it not?

A. That is correct.

Q. In Figure 4 of the patent there is a little

(Testimony of George F. McDougall.)

gasket in the end of one of the pipe members, isn't there? A. Yes, that is right.

Q. Now is that held in its groove by the pressure of the water? [268]

A. No. I thought it was in a groove and so stated at one time, and then I corrected it afterwards. I think you will find that it is not precisely a groove. There is a hook there and a seat for a U-section gasket. It looks to me like the gasket is held in place by a wire rope, or something, that is around in the bottom of it.

Q. Now look at Figure 11. Isn't that a cross section of the gasket?

A. Figure 11? I don't find Figure 11.

Q. It is up at the top of the page.

The Court: Figure 11, next to Figure 3.

A. That is a cross section of the gasket and it is a section showing a broken away part. That member that holds it in there is a wire spring.

Q. (By Mr. Graham) So whatever that groove is, it is held in there by mechanical means?

A. Yes, it is held in there—no, it is held in there by mechanical means, but the sealing effect is entirely hydraulic. That is just to hold it there so it won't fall out.

Q. Well then, what would you say was the purpose of that plate in Figure 4 that extends across the end of that pipe? A. What?

Q. What would you say was the purpose of that plate in Figure 4 which extends across the opening of that pipe?

(Testimony of George F. McDougall.)

A. I don't see any plate that extends across the opening of the [269] pipe.

Q. Well, I admit it is rather small but would you look at it with your glass and tell us if there is not a plate across the opening of that pipe without any number on it?

A. I can see everything that is on the drawing there. I can't see any plate across the end of the pipe. You know, if you cut a pipe in two you can see a circular line on the other half which will appear as a straight line when you are looking at it in projection.

Mr. Graham: The drawing is rather small. May I point out what I mean to the witness, your Honor?

The Court: Beg pardon?

Mr. Graham: May I point out what I mean to the witness?

The Court: Yes.

Mr. Graham: It has no number on it (indicating).

A. Oh, that is not a plate across the end of the pipe. That is the other side of the pipe, the same as this line at the end represents—this pipe is in sections.

Q. All right. Then what is the bolt in that member?

A. What is the bolt?

Q. Yes.

A. I don't see any bolt. I don't know (examining exhibit with magnifying glass).

Q. Has that a rigid casing or sleeve?

A. Yes, it has. [270]

Q. What is the number on it?

(Testimony of George F. McDougall.)

A. The one numbered 4, you mean?

Q. Yes.

A. That is apparently 22, I think, on the bell end.

Q. Has it an internal annular groove?

A. No, there is no internal annular groove in that. The packing mounting is in the other piece.

Q. So naturally there is not any packing member maintained in an annular groove in the sleeve?

A. Not in the bell. It is in the other piece, but that is immaterial. It doesn't make any difference which side they are on. They work just the same if you put it on one piece or the other.

Q. You say they work just the same?

A. It wouldn't make any difference in this case whether you—you would have to shape the parts a little bit differently, but if you wanted to work a circular arcuate tube into another one this way and get an elbow motion, it doesn't make any difference which part you put the packing on as long as it is properly designed. It could be put on one as well as the other.

Q. Would it function in the devices of Exhibit 70 or 47 or 48 if we put this device of a packing member on the unthreaded pipe end?

A. You are asking me to redesign all this stuff, Mr. Graham, and you can say a lot of things that way, but to sit here and [271] conjecture what might be done with it is hardly consonant with sticking to the truth.

Q. That is what I am trying to get at. You say it would not make any difference.

(Testimony of George F. McDougall.)

A. I say to a designer it would not make any particular difference. It is a matter of choice whether you put your packing on one part or the other.

Q. Now referring to the Berry patent, Exhibit 36, is there a sleeve into which an unthreaded pipe end extends?

A. When you are not speaking directly towards me it is hard to hear you.

Q. Is there a sleeve into which an unthreaded pipe end extends?

A. There is a sleeve into which a reduced section of pipe extends. Now there is another play on words there. Unthreaded pipe is used in the Lanninger patent meaning a pipe that is not threaded to another pipe. It was not threaded for attachment to another pipe. Now this particular pipe is threaded, but only amounting to a couple of annular rings on it to form a groove on the surface of it for holding the flange packing, and in the sense that it does not screw onto another pipe it is an unthreaded pipe. But it is actually threaded because the two members P and Q, which are annular rings, are screwed onto it and they are so arranged that the flange O of the flange packing R may be gripped between them to hold it in place.

Q. You say the only purpose of that thread on there is to mount [272] the packing member?

A. Well, it is evidently to mount another piece there, but it is not——

Q. Please describe that other piece.

A. No, I didn't describe that other piece. There

(Testimony of George F. McDougall.)

is a piece apparently riveted on there, and it seems to be both screwed and riveted on, but I think those are just short lugs. I don't think they go all the way around. I haven't read the description of it.

Q. It is not a packing to furnish a joint for a series or string of pipes, is it?

A. Why, apparently, yes.

Q. It is a series of connected articulated joints?

A. That is what is shown, but quite obviously the articulations can be 12 or 16 feet apart if you wish. That is merely a matter of choice. There are no dimensions given on there, you know.

Q. Now is there any frictional enclosing of an unthreaded pipe end by the packing member?

A. No. As I explained on my direct examination this pipe packing works the opposite way. It expands outwardly against the bell in order to make the seal. Figure 2 is when the pipe is at rest with no pressure inside of it. That flange "L" there is to support the packing so that it does not collapse inwardly. It shows it collapsed onto the flange "L" in Figure 3, the left hand end of it there, and it is shown under pressure conditions [273] in Figure 4 in projection to that first figure there, and it seals against the inside of the bell. That is just the same old principle, but reversed.

Q. But Exhibits 47 and 48 do not adopt that, do they?

A. They are not like that, no. 47 and 48 are—I haven't got that straight in my head. 47 and 48,

(Testimony of George F. McDougall.)

I think, are those two examples of the accused device; is that right?

Q. Yes.

A. They don't use that type of packing at all.

Mr. Graham: I will just have a few more questions, if your Honor please.

Q. Referring to the Serrell patent, Exhibit No. 39—

The Court: That is the faucet?

Mr. Graham: Yes, if your Honor please. At this time I raise the point that it is very apparent it is not in the art of a joint.

The Court: I think I agree with you. You might as well skip the cross examination on that because it is too remote. It shows what it is. It is not an attempt to give a loose joint to pipe so as to achieve a certain result. It is merely reducing a faucet so you can put a hose on it, and it is rigid. It has also two rivets by which it is made fast, to use a nautical term, and a faucet I don't think has anything to do with this art. It is connecting the faucet.

Mr. Graham: Well then, I will just— [274]

The Court: It is a piece to couple a hose up tight onto a faucet so that we can turn on the faucet and it will run into a hose which is smaller than the faucet itself. It is a typical reducer, I would call it, in plumbing. It is plumbing equipment. I don't see any similarity between the two, and none was pointed out. The mere fact it is a patent doesn't mean anything. It doesn't teach anything, and noth-

(Testimony of George F. McDougall.)

ing is claimed in the claims and nothing is disclosed that could in any way be anticipatory or related to the art of which we are talking. He says the object of the invention is to connect rubber tubing or hose with faucets, "and the objects are to secure a simple and inexpensive construction, to provide a device the body of which can be applied to the faucet in a semi-permanent manner and by persons without mechanical skill, to permit ready and secure connection of the hose with and disconnection of the same from the body of the device, which remains at all times upon the faucet, to prevent all possibility of the device being forced off the faucet by the water pressure, and to guard against leakage. These ends are attained by the construction, the preferred embodiment of which will now be briefly described."

I have seen it done in dairies in California, where they will connect a long piece of hose to one of these attachments and flush their barns, the concrete floor of the barn, and it is done in many of them. I have seen it done in double washtubs, where you do it so as to run the water far away and [275] you have only a central faucet. If you have a single connection and you don't have one of those movable spouts, why, I have seen a hose connected in that way. You can get your water in one tub rather than in another of the tubs. I don't think it is a kindred art at all. Furthermore, the reference was given more as a matter of academic interest. The Examiner made reference to it so as to

(Testimony of George F. McDougall.)

have the lawyers arguing about it. He didn't say what he found in it. I have looked through the wrapper, the file wrapper, and looking at the references made pro forma right in the middle of the proceeding—in other words, what he was doing was merely suggesting a few more references so he would be sure to draw claims that would not possibly conflict with some of the others. So far as I am concerned you may as well disregard that one.

Mr. Graham: That is all I have with this witness, your Honor.

The Court: Any redirect?

Mr. Middleton: No redirect, your Honor.

(Witness excused.)

Mr. Middleton: I may ask leave to call the witness again for one more question when we have proceeded further, but at this time there is no redirect.

The Court: All right. Have you any additional witnesses?

Mr. Middleton: Yes, your Honor; there will be two or three more. [276]

The Court: What is the nature of their testimony?

Mr. Middleton: To finish up the matter of the plaintiff's action in respect to those patent claims.

The Court: I think in view of the fact that there was a mere consultation and they never did anything on that, and the patent was rejected, the

entire action is immaterial. No estoppel could arise and certainly no laches. He has done nothing; merely consulted with the man, with the idea of procuring a patent, and the Patent Office rejected it and he accepted the rejection and never even followed it up. On the basis of that they never could go ahead and manufacture. I allowed the testimony to go in, but it is actually valueless so far as establishing either estoppel or laches.

Mr. Middleton: But the point that I have made, your Honor, does not go to the validity of the application or what happened to it. It goes to the fact that during that application this plaintiff came in and put a new construction on its claims.

The Court: I know of no authority which says that discussion of a patentee with somebody else, unless it amounts to misleading one into the belief that he could go ahead and manufacture a thing with immunity, amounts to an estoppel. The only estoppel there is in the law of patents is estoppel in the Patent Office, and that is where his claims were rejected and in order to secure the patent he had to limit it. Then he cannot be heard to say afterwards that he should have the broader interpretation. [277]

Now I have allowed the testimony to go as far as it has, and the testimony merely shows that these parties corresponded with the prospective inventor relating to an invention which was never patented. He was not their agent, authorized to communicate to others the right that they may resort to this latch and use it. He was seeking to patent it and

it was rejected on a foreign patent. I can't see how an estoppel can arise.

If you want to make a record I will let you offer testimony, but I can't see it has any bearing, because no laches could arise under those circumstances, and that state- [280] ment is too broad to be supported. I would like to see an authority that supports that statement to the extent that merely because the inventor says to the other fellow, "Now here is the way I construct it", in the absence of rulings on it, in the absence of developing without protest a device, in the absence of inducing him—what is that phrase they use in equity on that subject—lulling them into a sense of security in believing that they are free to act—only that can be considered in equity. That is what they call estoppel in pais in the old equity. Of course it is still a principle, because we have equity jurisdiction in these courts. But I cannot see the materiality of all the testimony that has gone in, because they don't show an estoppel. They don't show any action which would justify these defendants in assuming that they had a right to construct a device without any fear of infringing, if in fact it did infringe.

Mr. Middleton: The testimony would show, your Honor, that the defendants relied on the assurances conveyed to them.

The Court: By whom?

Mr. Middleton: By Mr. McDougall, in the light of his knowledge.

The Court: Mr. McDougall had no authority to convey assurance. All he was told was merely that

this particular latch might be patented and they collaborated with him in trying to have it done. We are not talking about a latch. This is only one of six or seven elements in the patent. He was not an [281] agent. He had no authority to go out and sell the rights of the patentee. A licensee has no right to give away the rights of the patentee. They don't have a general license. He is not the real owner of the patent. The license is limited to the exclusive manufacture for irrigation purposes. He is not an assignee of all rights of control or ownership of the patent. And while he may bring an action for infringement he is not the owner so as to bind the owner and authorize a third person who is in no business relationship with the owner to the construction of a patent which deviates from the claims allowed by the Patent Office. That is another point.

Another reason is because the alien who is represented here by the Alien Property Custodian had absolutely no right to have his rights affected by a mere licensee, whose license calls for the construction and sale of the patented device. It does not allow him to endanger—patent licensees have sometimes been sued for infringement when they went beyond the scope of their patent. So there is another reason why any such statement would not be a defense to infringement.

Mr. Middleton: Your Honor, in that case there will be only one short course of examination directed to show that this patent has remained a

paper patent and has not been put to practical application and use.

The Court: That is all right. I will allow you to show that. [282]

Mr. Middleton: Does the Court wish to continue now?

The Court: I cannot tonight, gentlemen. I have an engagement I have to keep. But we will have a session tomorrow.

Mr. Graham: May I ask, if your Honor please, to reserve a motion to strike out those exhibits which I objected to as irrelevant and immaterial relative to these letters?

The Court: I think you had better make it when he has rested.

Mr. Graham: I still reserve the right.

The Court: All right.

(Thereupon an adjournment was taken until tomorrow, Saturday, August 22, 1942, at 10:00 o'clock A. M.) [283]

Saturday, August 22, 1942, at 10:00 o'clock A. M., Court reconvened, pursuant to adjournment and proceedings herein were resumed as follows:

Mr. Middleton: If the Court please, Mr. Graham and I have, I believe, reached an agreement on the facts relative to the use and commercial success of the devices made and claimed to have been made under the patent in suit, and I will endeavor to formulate our understanding in the form

of a stipulation of fact, with the suggestion that if Mr. Graham in any manner feels I do not follow the tenor of our understanding he interrupt me as I go.

It may be stipulated, your Honor, as I understand it, that the plaintiff California Corrugated Culvert Company did during the years 1936 and 1937 make and sell a small number of couplers in the form exemplified by Exhibit 70 and incorporated the flange or hat gasket form therein shown; and excepting for that small number made in the years 1936 and 1937 there have been neither made nor sold any other couplers in the form shown by Exhibit 70.

That up to the year 1940 the principal commercial product in couplers of the plaintiff California Corrugated Culvert Company has been a coupler having the same characteristics as Exhibit 2. That is that lever action coupler. Beginning in 1940 and continuing to the present time the plaintiff California [284] Corrugated Culvert Company has additionally to the couplers responding to the characteristics of Exhibit 2 made and sold couplers responding to the characteristics of Exhibit 17, and in that form used a gasket in the form there shown. And in the State of Oregon in the years 1940 and 1941 the plaintiff California Corrugated Culvert Company has sold 2,467 couplers in the shape and form and using the gasket form exemplified in Exhibit 17.

Mr. Graham: That is substantially correct, your Honor, with these modifications: That when coun-

sel speaks of the form of the Lanninger patent and the shape of the gasket as a hat-shaped gasket he means the exact form shown in the drawings.

Mr. Middleton: As exemplified by the two exhibits that I have referred to, Exhibit 17 and Exhibit 70; is that correct?

Mr. Graham: By exact form I mean a packing member having a perpendicularly extended flange extending into a groove closely fitting that flange; and the further modification that from 1936 to 1940, while Exhibit No. 2 was the principal or what we might call the leading device, it also sold coupling members similar to Exhibit 17; and since 1940, while Exhibit 17 has been their leading or principal device they have also sold couplers similar to Exhibit 2.

The Court: I think for the purpose of a prima facie case or any finding of the Court that is a sufficient showing of reduction to practice. In the Byron Jackson case, to which I referred yesterday, Byron Jackson against Wilson, 43 Federal [285] Supplement, that was a rather bulky tool and the showing was that they had produced some thirty devices manufactured and constructed, but they were very large and sold at a price of some one hundred eighty or one hundred ninety dollars, and I held that bearing in mind the bulk and the price of the devices that was a sufficient showing of reduction to practice. Ultimately the reduction to practice is a relative thing. It depends on the device, on the cost, on the size and the territory, and

so I think we have gained probably a lot of time by your stipulation.

All right; the Court will accept the stipulation and consider it when determining the question of reduction to practice and will be bound by the wording of the stipulation.

Mr. Middleton: Will it aid the Court in that connection if we attempt to give the Court an idea of the number that have been produced?

The Court: Well, you may do it in the argument, if you wish, but I don't want to take time at present.

Mr. Middleton: Well, in order to have a basis of argument, of course, we should have some facts either stipulated or testified to, if it will aid the Court.

The Court: I think so far as the Court is concerned your stipulation is broad enough to show reduction to practice, and that is all that is important. Any greater detail is not material, because I am not taking an accounting here. If there is an ac- [286] counting it is not going to be taken by me; it is going to be taken by a master.

Mr. Middleton: The only thing I have in mind the stipulation mentioned a small number—

The Court: Then it becomes a question of argument as to whether that is sufficient reduction to practice.

Mr. Middleton: As a comparative thing maybe we should establish what the amount of production has been as ten thousand, or something to give the

Court something to measure by. That is the only thing I was thinking about.

The Court: Can you stipulate to that?

Mr. Graham: That is only as to Exhibit 70. There were but relatively few of that particular device made. I think I would be willing to concede with regard to Exhibit 70 that in that exact form there were not over a half a dozen of those made.

The Court: That would not go out of the stage of models.

Mr. Graham: I would say as to what particular device there was not over a half a dozen made.

Mr. Middleton: Would you say further that the annual sales in commercial practice has run into the thousands?

Mr. Graham: Of which device?

Mr. Middleton: Of any of these couplers that we have had before us which have been made commercially.

Mr. Graham: That is of the plaintiff's or defendants'?

Mr. Middleton: Of the plaintiff's. [287]

Mr. Graham: I would say that Exhibit 2 and Exhibit 17 have run into the thousands.

Mr. Middleton: Annually?

Mr. Graham: I would not want to say every year. I don't know. I can find out for you in just a second. It might save a lot of time.

The Court: What does the device sell for commercially, gentlemen? Let's get that as a criterion. It all depends ultimately on the size of the equip-

ment. You could have a little device like in the Mantz case, when he had nothing but a fastener on a window, and the thing would not cost over four or five cents. You might manufacture a million and not get anywhere.

Mr. Middleton: The Court should understand that these devices are made all the way from an inch and a half and two inches up to possibly thirty-six or forty inches in diameter.

The Court: I understand the size of the pipe varies. I can understand that.

Mr. Graham: Maybe we can stipulate now, if your Honor please, that the number sold of both Exhibit 2 and Exhibit 17 ran into quite a number of thousands annually. They estimate about ten thousand of No. 2 annually and about nine thousand of No. 17 annually.

The Court: All right.

Mr. Middleton: And as I understand, as to Exhibit 70 there were only about half a dozen of those?

[288]

Mr. Graham: Yes; that is, in those particular years, 1936 and '37.

Mr. Middleton: Now to complete the record in the introduction of exhibits, your Honor, I will offer at this time Defendants' Pre-Trial Exhibit 25 and 25-A.

(Copy of Patent 222,195, T. J. McGowan, so offered, having been previously marked Defendants' Pre-Trial Exhibit 25, was marked received as Defendants' Exhibit 25; an enlargement of the drawings of Patent No. 222,195,

so offered, having been previously marked Defendants' Pre-Trial Exhibit 25-A, was marked received as Defendants' Exhibit 25-A.)

[Printer's Note: Defendants' Exhibit No. 25 is set out in full at page 391 of this printed record.]

Mr. Middleton: I also offer in evidence at this time Defendants' Pre-Trial Exhibits 29 and 29-A.

Mr. Graham: What are they being offered for, Mr. Middleton?

Mr. Middleton: 25 and 25-A, patent to McGowan, is offered in anticipation of the prior art. 29 and 29-A are offered for the same reasons.

The Court: They may be received.

(Copy of Patent No. 685,818, to R. F. Close, so offered, having been previously marked Defendants' Pre-Trial Exhibit 29, was marked received as Defendants' Exhibit 29; enlargement of drawing of Patent No. 685,818, so offered, having been [289] previously marked Defendants' Pre-Trial Exhibit 29-A, was marked received as Defendants' Exhibit 29-A.)

[Printer's Note: Defendants' Exhibit No. 29 is set out in full at page 401 of this printed record.]

Mr. Middleton: At this time I will also offer in evidence, your Honor, Defendants' Pre-Trial Exhibit 37, being a patent to Ward, to show the prior art, the state of the art.

(Copy of Patent No. 1,448,646, so offered, having been previously marked Defendants'

Pre-Trial Exhibit 37, was marked received as Defendants' Exhibit 37.)

[Printer's Note: Defendants' Exhibit No. 37 is set out in full at page 423 of this printed record.]

Mr. Middleton: I also offer at this time, your Honor, Defendants' Pre-Trial Exhibits 46-A to 46-F, inclusive. In this connection I might say for the Court's information that the originals of these documents in Exhibits 46 and the various papers there are stipulated by both parties and the dates appearing on the various documents are stipulated to be correct.

The Court: All right.

Mr. Grhaam: But the legendary matter or the descriptive matter in the booklets just offered is not conceded to have any authority or to be correct.

Mr. Middleton: The plaintiff does not so concede.

Mr. Graham: Yes, and therefore objects.

The Court: Well, if there is an objection pending I will overrule the objection.

(The booklets and documents referred to, relating to "Vim" leather packings, so offered, having been previously marked Defendants' Pre-Trial Exhibits 46-A to 46-F, respectively, were marked received as Defendants' Exhibits 46-A, 46-B, 46-C, 46-D, 46-E and 46-F, respectively.)

Mr. Middleton: The defendants offer at this time as an exhibit their Pre-Trial Exhibit 90.

(The letter referred to, dated November 30, 1940, William S. Graham to Alaska Junk Company, so offered, having been previously marked Defendants' Pre-Trial Exhibit 90, was marked received as Defendants' Exhibit 90.)

Mr. Middleton: The defendants also offer at this time as an exhibit Pre-Trial Exhibit 94, being a photostatic copy of pages from Knight's Mechanical Dictionary.

(Photostatic copy of two pages from Knight's Mechanical Dictionary, No. 1103 and 1104, so offered, having been previously marked Defendants' Pre-Trial Exhibit 94, were marked received as Defendants' Exhibit 94.)

Mr. Middleton: Defendants also offer as an exhibit Defendants' Pre-Trial Exhibit 95, being another photostatic copy of a page from Knight's Mechanical Dictionary.

(Photostatic copy of page 1259 of Knight's Mechanical Dictionary, so offered, having been previously [291] marked Defendants' Pre-Trial Exhibit 95, was marked received as Defendants' Exhibit 95.)

The Court: Exhibit 90 is merely the notice?

Mr. Middleton: That is right, your Honor.

The Court: The letter or notice of infringement and request to desist.

Mr. Middleton: Defendants also offer at this time as an exhibit, Pre-Trial Exhibit 50, which is the center coupling there on the Court's desk. This exhibit is offered in order to exemplify another

form of locking means described in Claim 3 of the Lanninger patent.

Mr. Graham: That is the defendants' exhibit, if your Honor please. I don't object to the exhibit except that it is manifestly not made according to the structure disclosed in the patent nor with the means of operation or the purpose expressed in the patent, because it has no flexibility at all.

Mr. Middleton: In that connection, if the flexibility is the point of the objection, why, I would respond that shows small flexibility but it is evident that by simply enlarging the hole a little bit you would get greater flexibility.

The Court: Well, unless it exemplifies something I don't know what place it has in the record. It makes a lot more hardware for the Clerk to have to handle.

Mr. Middleton: I just wanted to inform the Court as to another form of that locking means, was all, but I am not very [292] particular about it. It is not quite the same as the others.

The Court: This is one piece instead of two pieces and has a cotter pin just like the other, except it has one extension instead of two.

Mr. Middleton: This one has a collar around the pipe instead of having it welded on.

The Court: That is correct.

Mr. Middleton: I am not particular about it if the Court would rather——

The Court: It might show one way of reducing to practice. I think, gentlemen, this should be borne in mind in regard to any exhibit. I have

studied this patent much more carefully in the last day or so than I had before, and the locking means is not only illustrated in the drawings but described very specifically in Column 2, lines 65 to 70, as consisting of “an eye ‘c₁’ of pipe ‘c’ projects with sufficient play into a lug ‘a₁’ of the sleeve ‘a’ and is connected with the same by a loosely inserted cotter pin ‘d’. The easy movement of the hinge ‘c₁’, ‘a₁’ and the ample play of the cotter pin in the borings of the hinge further increase the flexibility of the joint of the pipes and the facility of this joint to adapt itself to the irregularities of the ground and the available space.”

Now another thing is this: Not only the drawings but the specifications would seem to stipulate or postulate, rather, a peculiar hinge-like affair, and that is further illustrated [293] by the fact that in all claims, in claims 4, 5 and 6—they of course are not involved here, but they nevertheless may be resorted to for a better understanding of the claim in suit—that connection is also claimed as an element of invention. Now that has a very important bearing on the case, and any reduction to practice which does not take these facts into consideration is not helpful in determining any of the issues in this case. So that unless counsel could agree that this is constructed according to the teachings or is the equivalent, I don’t see that this exhibit helps us any at all.

Mr. Middleton: I am perfectly willing it be ruled out, your Honor.

The Court: Well, I will sustain the objection,

then, to Exhibit 50 on the ground there is no showing it is constructed according to the teachings of the patent. In fact, I would say it is not. There is sufficient deviation there to do away with the very object sought to be accomplished by the loose connection, namely, an added flexibility which the inventor evidently had in mind, because he put it everywhere—he puts it in the drawings, he puts it in the specifications, and then claims it in three claims in suit. Of course, he doesn't claim it here. Nevertheless, in determining what the invention is you have got to take it as a whole, and you can't split it up into elements. You can't claim part of the whole. There is such a thing as claiming a modification, but here the claim is of the whole of [294] the invention. All right.

Mr. Middleton: In furtherance of the line of questioning that was followed yesterday, your Honor, I understand in advance that the Court has ruled that out, but merely to complete the record in that particular I will offer as exhibits Pre-Trial Exhibits 85, 86, 84, 92 and 93, with the sub-numbers, with the understanding that the Court, following yesterday's ruling, will probably rule against their admission. They all concern this matter of the construction placed on the patent—

The Court: The objection will be sustained. As I said yesterday I am satisfied there is no estoppel arising from any negotiations that may have been going on leading or intending to lead to the patentability of a lock that might take the place of the latching means described in the patent.

Mr. Middleton: I merely wanted to complete the record in that respect.

The Court: That is all right.

Mr. Middleton: I will call Mr. Pierce.

RALPH H. PIERCE

was thereupon produced as a witness in behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Middleton:

Q. You stated your name to the reporter, did you, Mr. Pierce? [295] A. Yes.

Q. Where do you live? A. Eugene, Oregon.

Q. What is your business, Mr. Pierce?

A. Manufacturing pipe couplers.

Q. How long have you been engaged in that business? A. Ten years.

Mr. Middleton: Will the bailiff please hand to the witness Exhibits 47 and 48.

Q. Examining Exhibits 47 and 48, Mr. Pierce, I will ask you whether or not you manufacture couplings similar to those exhibits excepting for the locking means that are shown on each thereof.

A. I do.

Q. How long have you been engaged in the manufacture of those couplings?

A. Ten years.

Q. In manufacturing that coupling, Mr. Pierce, do you manufacture or buy from others the gas-

(Testimony of Ralph H. Pierce.)

kets that are used as a part of the coupler structure? A. I have the gaskets made.

Q. Do you insert them in the couplers as you sell them? A. No.

Q. Beg pardon?

A. Not in this half coupler. In the case of the full coupler we [296] do put the gaskets in.

Q. Can you speak a little louder?

A. In the case of the full coupler we put the gaskets in, but what we call the half coupler, this particular model, we don't insert the gaskets.

Q. What do you do? Send the gaskets along with them when you sell them? A. Yes.

Q. Now have you had occasion to test those couplers and examine them in use? A. Yes.

Q. Will you state whether or not it is necessary, as you found it from your tests and your examinations of couplers in use, that the gasket or packing be a tight fit within the hub?

A. No, it is not necessary to be a tight fit. I notice this particular one here seems to be quite loose.

The Court: Speak a little louder.

A. The gasket can be quite loose in the groove. This particular gasket is loose at that place. The gasket is not tight in the groove. It still seals. The pressure of the water presses the lips up against the casing between the pipe and the coupler so that it seals, not necessarily being a tight fit.

Q. (By Mr. Middleton) In forming the metal

(Testimony of Ralph H. Pierce.)

do you sometimes form those that do not fit tightly against the rubber gasket?

A. There is quite a little difference in steel. Some is harder [297] than others and they roll differently. Sometimes a diameter here will be as much as an eighth of an inch more than it is in other cases.

Q. And if there is play between the gasket and the steel shell does that play or space have any effect in the usefulness of the gasket? A. No.

Q. When reduced to its function in the field?

A. No, it does not.

Q. Does the joint remain tight even if the gasket is loose in a state of repose?

A. Yes, with the possible exception except when there is very, very low pressure it might seep through a little bit, but as soon as any pressure is applied it seals.

Mr. Middleton: That is all.

Cross Examination

By Mr. Graham:

Q. Mr. Pierce, you say that it is not necessary that the packing member fit tight in the groove?

A. No, it is not necessary.

Q. But you have the gaskets made, do you not?

A. Yes.

Q. Do you have them made of lesser diameter than the groove?

A. No, the gaskets are uniform in diameter, but there is a variation in coupler size, so sometimes it is tight and sometimes [298] it is loose.

(Testimony of Ralph H. Pierce.)

Q. Do you intentionally make some of them greater diameter than others?

A. No, I don't do that intentionally. It is just a matter of during the process of manufacture some of them turn out that way.

Q. A little louder.

A. I say we do not intentionally make them larger.

Q. You don't intentionally make them smaller?

A. No.

Q. If a man ordered one hundred of your couplers of 4-inch diameter do you make some of them more than 4-inch and some of them less than 4-inch?

A. We have certain machines to manufacture these couplers and, as I said before, the hardness of the steel controls the diameters to some extent. We run these couplers through the machine and some of them—if they vary a fraction of an inch they are still serviceable and we ship them out.

Q. So this is really imperfection of manufacture? A. That is right.

Q. If the coupler happens to be one of those which is of lesser diameter there is a tight fit, very tight fit? A. That is right.

Q. And if it happens to be an imperfection which makes it of a greater diameter it happens to be a loose fit? [299] A. That is right.

Q. But the intention is to make them all a diameter wherein the outer rim of the gasket fits closely in the groove?

(Testimony of Ralph H. Pierce.)

A. Yes, it is supposed to fit closely.

Q. Beg pardon?

A. It should fit fairly closely in order to hold it in place.

Q. When the water is put into the line under pressure is there still space between the inner wall of the groove and the gasket member?

A. Not after the pressure is applied.

Q. That comes in tight? A. Yes.

Q. Held tight? A. Yes.

Q. What kind of a machine do you make that coupler with, the sleeve member?

A. Well, there is two operations in making that. One is a punch press and the other is a roll. We first offset the end of the coupler to get a larger diameter. Then we put it in a roll that rolls the casing and puts a flange on the end.

Q. So that when it comes to putting that internal annular recess in it you do that with rollers?

A. Yes.

Q. That is, one roller is concave on the outside of it and there is one roller that is convex on the inside of it? [300] A. That is right.

Q. And that rolls a groove in there, what we have called a groove? A. Yes.

Q. Do the rollers go around or does the pipe go around? A. Both.

Q. One goes around the other, orbital movement?

A. Both rollers are driven similar to rollers in a wringer, and this coupler goes around in be-

(Testimony of Ralph H. Pierce.)

tween, fits over the inside roller, and they are rolled together under pressure, fit together under pressure, so it forms the metal in that shape.

Q. Now you have seen the Lanninger patent, haven't you? A. Yes.

Q. The figures in the Lanninger patent of the sleeve appear to be heavy metal, don't they?

A. I believe they do.

Q. And with that type of metal, that heavy metal, you would make it out of casting?

A. If I was going to make it I probably would.

Q. And then maybe finish them up inside with a reamer, or something like that. Now could you make that type of annular groove as shown in the Lanninger patent with rollers?

A. Not on that heavy material. It is very possible it could be on thin material. I never tried it; I have never seen it tried.

Q. You never tried that? A. No. [301]

Q. But you make your coupler there with a wide groove because it is in thin metal and you can roll it better?

A. The reason I make this wide groove is to accommodate the gasket, which has considerable body on the outside, which prevents the pipe from pushing it out of the groove when you insert the pipe. If the gasket had a thin lip on the outside when you go to push the pipe in it might catch and push the gasket ahead of the pipe and get it out of place. When there is considerable body to

(Testimony of Ralph H. Pierce.)

the gasket and it is shaped to fit the groove there is no possibility of pushing it out of the seat when you put the pipe in.

Q. The forward wall of that groove prevents it from being pushed forward?

Mr. Middleton: If the Court please, I think his cross examination is improper. The direct was confined to the fit of the gasket in the sleeve.

Mr. Graham: That is what I am attempting——

The Court: Well, he has a right to inquire to determine the foundation for the opinion expressed by the witness that in actual practice the looseness of the joint does not make much difference. Go ahead.

Mr. Graham: May I have the question read, your Honor?

The Court: Yes, read the question.

(Last question read.)

The Witness: What do you call the forward wall? [302]

Q. (By Mr. Graham) Well, the wall furthest removed from the insert or outwardly extended end. A. This side?

Q. I would say that was the forward wall, being the wall of the groove opposite the hook member.

The Witness: What is question again?

(The question was re-read as requested.)

A. Yes.

Q. (By Mr. Graham) And the rearward wall

(Testimony of Ralph H. Pierce.)

prevents it from being pushed backward out of the sleeve when there is pressure of water in the pipe?

A. Yes.

Q. Then there is a tight fit when there is pressure between the packing member and the internal wall of the groove? A. That is right.

Q. Now there is a flexible relation between the coupler that is attached to one pipe and the inserted pipe; isn't that correct?

A. That is right.

Q. And that is shown in your catalogue that has been put here in evidence? A. It does.

Q. It has a cross section cut in it?

A. It has flexibility.

Q. Then when your pipe which has the unthreaded end is inserted in that the packing member has a free cylindrical portion that [303] extends around and encloses the unthreaded pipe end?

A. That is right.

Q. And that seals against the unthreaded pipe end? A. Yes.

Q. Now in rolling that annular groove in the metal that is rolled on a concentric arc, isn't it?

A. Yes.

Q. Then is the outer rim of your gasket formed on a concentric arc? A. No, it has two arcs.

Q. In which portion of the gasket is the arc greater?

A. The portion fitting in what you call the forward side of the groove.

(Testimony of Ralph H. Pierce.)

Q. That is the free edge of the outer rim?

A. That is right.

Q. Up to the peak of that rim is the larger arc?

A. Yes.

Q. And the other naturally is the smaller arc.

When you put that gasket into that groove what is the purpose of making one of those of a larger arc?

A. Well, the original purpose was to cause that portion of the gasket to contact the metal, closing against leakage under low pressure.

Q. I didn't get that.

A. The purpose of the larger arc is to cause the rubber to con- [304] tact the metal in the groove, sealing the joint under low pressure.

Q. When that larger arc is pressed into the groove then it pushes the back wall of that rim against the contacting wall of the groove, doesn't it?

A. I wouldn't say it pushes it in there. That naturally locates itself. The forward lip of the gasket is under some compression when it fits into the groove.

Q. It fits into the groove with what?

A. I say, the forward lip of the gasket when it is pushed into position is somewhat compressed to conform to the arc of the metal.

Q. Compressed by what?

A. By its own expansion of rubber.

Q. I see. Then if it is somewhat compressed

(Testimony of Ralph H. Pierce.)

doesn't it follow that it pushes the other wall of the rim against the wall of the annular groove?

A. Well, the gasket would naturally come into contact with that wall anyway, due to its shape.

Q. It would naturally do that anyhow?

A. Yes.

Q. Yes. Well then, when there is compression of the larger arc on the free end of the rim doesn't that compression push the gasket against the rear wall?

A. It would have a tendency to hold it there, yes.

Q. Does it make a tighter fit? [305]

A. Yes, it would be a tighter fit.

Q. And that would be increased when there was pressure of water in the pipe line?

A. That is right.

Mr. Graham: That is all.

Mr. Middleton: No further questions, your Honor.

(Witness excused.)

Mr. Middleton: I will call Mr. McDougall, your Honor, for a question or two on aggregation and then I will be through.

GEORGE F. McDOUGALL

was thereupon recalled as a witness in behalf of the defendants and was further examined and testified as follows:

Direct Examination

By Mr. Middleton:

Q. Mr. McDougall, I will inquire whether or not you have examined the Lanninger patent in suit with respect to the operation in use of the various elements described in Claim 3.

A. Yes, I have.

Q. Can you state to the Court whether or not the various elements described in Claim 3, as we have been over them here many times, operate in use each pursuing and accomplishing its own function and result, or whether the combination as a whole operates and functions to produce a new result? [306]

Mr. Graham: I think that calls for a conclusion——

The Court: That is not proper expert testimony. That is the function of the Judge. The Court must determine that. That is not a subject of expert testimony. You might as well ask him if he thinks there is infringement. You don't prove whether you have a combination or an aggregation by expert testimony. If that were true you might as well abolish the judges.

Mr. Middleton: Well, I want to record his opinion for what it is worth.

The Court: Well, I don't want an expert to tell

(Testimony of George F. McDougall.)

me how to decide a lawsuit. He has got to enlighten me as to what is before me, but not decide it. That is not his province. I can decide it and disregard all experts, take the testimony and take the descriptions given me in the file and the records and the patents and others of the instruments and base my own conclusions as to any patent except one, probably, involving higher mathematics or the like. That is what the courts have insisted at all times. That is why there has been a necessity to call a halt to the wild speculations of experts in patent cases. That is the province of the Court to determine, in the light of the testimony, whether there is a true combination or not.

Mr. Middleton: In that case the defendants rest.

(Witness excused.) [307]

(Short recess.)

Mr. Graham: I would like to call Mr. Hanson, if your Honor please.

LAUNCELOT W. HANSON

was thereupon produced as a witness in behalf of the plaintiffs, in rebuttal, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Graham:

Q. You have given the reporter your name?

A. Yes.

(Testimony of Launcelot W. Hanson.)

Q. What is your address?

A. 678 San Fernando Avenue, Berkeley.

Q. Your occupation?

A. Production engineer.

Q. With what company?

A. California Corrugated Culvert Company.

Q. The plaintiff in this action? A. Yes.

Q. How long have you been with them?

A. About sixteen years.

Q. And what has been your educational background in connection with engineering?

A. Graduate of the Massachusetts Institute of Technology in Boston. [308]

Q. What has been your practical experience?

A. Practiced engineering ever since graduation in 1923.

Q. What has been your experience in connection with pipes and pipe joints?

A. Being manufacturers of pipe we have always been interested in pipe joints for connecting pipes.

Q. When you say "we" you mean the California Corrugated Culvert Company?

A. That is correct.

Q. The plaintiff here. Have you read the Laninger patent here in suit? A. I have.

Q. And made somewhat of a study of it?

A. Yes, sir.

Q. Do you know what the practices were in irrigation relative to pipes and joints over any lengthy period of years?

(Testimony of Launcelot W. Hanson.)

A. Well, we became particularly interested in irrigation about 1932.

Q. What was the type of irrigation pipe and joint being used at that time?

A. The general practice as shown by the government bulletins was to connect pipes together permanently and leave them in the ground or on the ground so that they would always be in place and not move them from place to place. Then sprinklers were installed in the pipes of one type or another and left in [309] place, so that when they wanted to sprinkle or irrigate they would just turn on the water and the pipes would automatically be in place.

Q. How far apart, on an average, were these lines of pipe put in order to irrigate?

A. That would depend upon the pressure and the type of nozzle used, but probably around fifty or forty feet.

Q. Would they have a line of pipe every fifty or forty feet?

A. That is correct.

Q. They would leave those permanently installed?

A. That is correct.

Q. You have seen them in that type of irrigation installed?

A. Yes.

Q. What development or change did the Laninger patent structure accomplish with relation to pipes and pipe joints?

A. It made a portable pipe which could be moved from place to place and made necessary only one line of pipe rather than numerous lines of pipe to cover an entire field. You could lay the line in one

(Testimony of Launcelot W. Hanson.)

position and leave it there for a certain length of time until enough water was sprinkled on the ground and then the pipe could be disconnected and moved a lateral distance, probably fifty feet, and then allowed to operate again, which meant that you only needed one line whereas in the old system you needed numerous lines.

Q. Would what you refer to as the old system of connected and [310] permanently installed pipes adapt itself to the irrigation of irregular ground?

A. They would use special fittings for that purpose.

Q. What type of fittings did they use?

A. Well, usually they used a threaded pipe and threaded elbows.

Q. Would that be a permanent structure?

A. That would be a permanent structure.

Q. And would they have to use the same thing to go around a bend? A. That is correct.

Q. Now is there anything in the Lanninger patent that permits you to install pipes on irregular ground without permanent fixture?

Mr. Middleton: If the Court please, I believe that the patent itself answers that question.

The Court: I think that is rather a leading question. Will you read the question?

(Last question read.)

The Court: Well, the objection will be overruled. I think it is all right. You may answer.

A. The flexibility in the joint of the Lanninger

(Testimony of Launcelot W. Hanson.)

patent permits you to lay the pipe on irregular ground.

Q. (By Mr. Graham) Does going over irregular ground or around bends involve any more pressure in the pipe than a straight line?

A. Practically none. It is not noticeable. [311]

Q. What pressures do they use normally in irrigation?

A. Normal sprinkler irrigation goes from 30, I would say, to about 80 pounds. That would all depend upon the conditions, the length of the line, the size of the nozzles, and the rapidity with which you wished to apply the water.

Q. What would the effect of pressure within irrigation pipe and joints of the Lanninger type cause to happen?

A. I didn't understand.

Q. I say what would pressure in the pipes of the Lanninger type cause to happen?

A. It would cause making the joint more tight. The higher the pressure the more the tightness.

Q. Now the Lanninger patent speaks of a means of securing the sleeve on an unthreaded pipe end; is that correct?

A. Correct.

Q. Would that element have anything to do with the pressure in the pipe?

A. That element would be required to keep the pipe from blowing apart.

Q. They would otherwise blow apart under normal pressures?

A. Correct.

Q. How long is the average pipe attached to one of these couplers?

(Testimony of Launcelot W. Hanson.)

A. The pipe is usually 20 feet, as that is a practical length for a farmer to carry.

Q. About what weight are they? [312]

A. Four-inch pipe in the weight in which we make it weighs, I believe, 54 pounds.

Q. What is the lateral swing of the end of the pipe which is furthest removed from the coupler when you use the Lanninger patent device?

Mr. Middleton: Just a moment. If the Court please, I think that should be identified to one of the exhibits here. I believe that Mr. Graham is referring to Exhibit 17, but I would like it identified.

The Court: Well, if the witness is referring to one of the exhibits I think it is really better to have the reference. Go ahead.

Q. (By Mr. Graham) Did you ever hook pipe of some length onto a Lanninger coupler?

A. Yes.

Q. That you made in the early days, as was stipulated? A. Yes.

Q. About how much swing laterally is there to the furthest removed end of the pipe?

A. Twenty-foot length?

Q. In a 20-foot length. A. About 3 feet.

Q. How much swing is there in the end of the pipe in your Exhibit 17? A. About 3 feet. [313]

Q. Now referring to Exhibit 17, that is your commercial structure which you claim is made under the Lanninger patent? A. That is right.

Q. Now is it a pipe joint which is used in connection with pipes? A. It is.

(Testimony of Launcelot W. Hanson.)

Q. Is one end of the pipe unthreaded?

A. Yes.

Q. What happens to the end of the pipe when you insert it into the sleeve member?

A. They just telescope together.

Q. Is it held in there by anything?

A. Not until the latch is placed in position.

Q. By being held in there I mean is it held in the sleeve?

A. Is the plain end or unthreaded end——

Q. Yes.

A. ——held in the sleeve?

Q. Yes.

A. It is held in by means of the hinged connection.

Q. That Exhibit 17 has a rigid sleeve?

A. It has.

Q. Has it an internal annular groove?

A. Yes.

Q. Has it an elastic packing member in the groove? A. Yes.

Q. And does the elastic packing member have a flange? [314] A. Yes.

Q. Does that flange extend into the internal annular groove? A. Yes.

Q. What holds it in there?

A. Frictionally held.

Q. No bolts? A. No bolts.

Q. And has Exhibit 17 means for hingedly securing the sleeve on the pipe having the unthreaded end? A. Yes.

(Testimony of Launcelot W. Hanson.)

Q. You spoke of that as what member?

A. The hinged member?

Q. The means for hingedly securing; the latch on the top?

A. Means for hingedly securing the sleeve on the unthreaded pipe end.

Q. Yes. Which portion is that?

A. That is this combination of the latch and band and the lug in connection with the flexibility of the rubber which makes that possible.

Q. The cross section of your sleeve in Exhibit 17 is not identical in form with the cross section of the figures shown in the Lanninger patent, is it?

A. No, it is not identical.

Q. What prompted you to make the change in the form? A. Of the sleeve? [315]

Q. Of the sleeve?

Mr. Middleton: If the Court please, I fail to see the materiality of that question. The fact is that they make it this way.

Mr. Graham: Are you conceding, Mr. Middleton, that this commercial device here is within the disclosure of the Lanninger patent?

Mr. Middleton: Certainly not.

Mr. Graham: Then I have a right to show that it is.

Mr. Middleton: The question is not could it be that way. The question is is it that way.

The Court: I don't think the reasons are material. I will sustain the objection to the particular question. He can point out whether there is in his

(Testimony of Launcelot W. Hanson.)

opinion a device within the teaching of the patent, but he can't give his reasons. The reasons are immaterial.

Q. (By Mr. Graham) Did you make some mechanical change in the form of the sleeve as shown in the Lanninger patent as compared with Exhibit 17? A. Yes.

Q. What are those changes?

A. Instead of coming directly back on itself and making a narrow groove we made a longer groove with a slope on the back.

Q. Why did you make that slope or incline?

Mr. Middleton: That same objection, your Honor.

The Court: Objection sustained. [316]

Q. (By Mr. Graham) What purpose is served by making that slope or incline to the outer wall of the groove?

A. There are two reasons why that is done.

Mr. Middleton: If the Court please, let the answer be confined to the purpose and not to the reasons.

The Court: Yes, the function to be performed. Confine yourself to the function and what you sought to achieve; not the reason—what you sought to achieve by the change.

A. We sought to achieve a more practical application.

The Court: I see.

Q. (By Mr. Graham) Why is it more practical?

(Testimony of Launcelot W. Hanson.)

Mr. Middleton: The same objection, your Honor.

The Court: Well, that one I will allow. Objection overruled. Go ahead.

A. Because this type of groove is more easily fabricated from a roll section and it also allows the galvanizing to drain out when the pipes are galvanized. In many cases they are galvanized.

Mr. Middleton: I move to strike the answer as not responsive to the question of function there.

The Court: Overruled. We will let it stand.

Q. (By Mr. Graham) Did that change in structure make any difference in mode of operation as compared with the device of the Lanninger patent?

A. They both operate in the same way. [317]

Q. What do you mean? Will you please explain that. What do you mean by operate in the same way?

A. They both enclose a rubber gasket and make a tight joint.

Q. Do they operate the same when pressure is in the pipe? A. Yes.

Q. Is there any functional relationship between that slope or incline in the sleeve and the packing member which is in that Exhibit 17?

A. It is to retain the rubber packing in place.

Q. I am talking about the inclined surface. What is the function of the inclined surface from your annular groove?

A. Well, the inclined surface holds the rubber gasket in place.

Q. Holds it in place when?

(Testimony of Launcelot W. Hanson.)

A. At all times.

Q. Does it have any function in connection with the insertion of the pipe?

A. It holds the rubber gasket when the pipe is being inserted.

Q. What do you mean by holds it?

A. It is a method of keeping the rubber gasket from moving out of place.

Q. In which direction?

A. Well, the back slope here keeps it from moving backwards onto the pipe, and the front slope keeps it from moving forward.

The Court: The front slope is really what is designated as the groove; is that what you call that, a groove? [318]

A. That whole section here would be the groove.

Q. (By Mr. Graham) And one end of that groove has an inclined wall and one a more or less perpendicular wall?

A. Yes.

Q. Does the elastic packing member that you have in that device in Exhibit 17 function to seal the joint when pressure is in the pipe?

A. Yes.

Q. How does it function?

A. The pressure of water against the gasket forces it against the side of the annular groove.

Q. What is the direction of pressure with regard to water in the pipe?

A. Pressure is always normal to the surface.

Q. What do you mean by normal?

A. At right angles.

(Testimony of Launcelot W. Hanson.)

Q. And that gasket has a rear portion to its outer rim that abuts the wall of the annular groove?

A. What was that question?

Q. I say, the packing member has a rear wall that abuts the annular groove?

A. That is correct.

Q. And is that what you speak of when you say that pressure in the pipe pushes that packing up against the rear wall? A. That is right. [319]

Q. And that is because the pressure in the pipe is substantially axial to the length of the pipe and therefore presses backward?

Mr. Middleton: Just a moment. If the Court please, the witness just testified it was at right angles to the length of the pipe; not axial.

The Court: He is an expert. Go ahead; he may explain.

A. Pressure is always normal.

Q. (By Mr. Graham) Pressure is normal to a resisting surface? A. That is correct.

Q. But the direction that the pressure comes from is a back pressure in the pipe, isn't it?

A. It is pressure within the pipe.

Q. Yes. Now does that same thing happen in the Lanninger gasket? A. Yes.

Q. Explain how that occurs in the Lanninger gasket.

A. In the Lanninger gasket it has a vertical rim around the outside of the gasket, and that vertical rim contacts a metallic surface on the open end of

(Testimony of Launcelot W. Hanson.)

the coupling and any pressure from inside the pipe forces that rubber gasket against that rim.

Q. Forces what portion of the rubber gasket?

A. The rim portion.

Q. Do you use the word "rim" as synonymous with the word "flange" that the patent uses?

A. Yes.

Q. Now how does that effect of pressure operate in the packing [320] member in Exhibits 47 and 48?

A. I take it this is 47. It is a little indistinct here.

Q. Now how is the sealing of the gasket against the sleeve brought about in Exhibits 47 and 48?

A. Well, the pressure acts against the gasket and forces the gasket against this flat rim on the open end of the coupling, and also forces the gasket within this groove outwardly.

Q. Is that what you mean by pressure being normal to the wall of resistance?

A. That is correct. It is normal around each point here—it is at right angles at any point on a circle or flat, theoretically a flat, and it is normal to that.

Q. So that it presses against both the forward wall of the groove and presses against what you might call the top or outer wall of the groove and presses against the back wall of the groove?

A. That is correct, yes.

Q. And in your opinion is that the same mode of operation as is shown in the Lanninger patent?

A. It is the same mode of operation, but this one has a longer line of contact than it does on the Lanninger patent.

(Testimony of Launcelot W. Hanson.)

Q. Is that because the groove is larger?

A. That is right.

Q. If you made the groove in the Lanninger patent of that particular area would it operate in the same way, with the same effectiveness? [321]

A. Your pressure is always the same as the area in this particular case varies, so if you have more area and the same pressure you have the same load.

Q. Does it make any difference whether that is on a curved surface or a straight surface?

A. No, it is always normal to the surface.

Q. It is a question, then, of area?

A. It is a question of area.

Q. And if the areas in Exhibit 17, 48 and 47 were the same then there would be the same degree of sealing?

A. That is right.

Mr. Graham: That is all.

Cross Examination

By Mr. Middleton:

Q. Are you familiar, Mr. Hanson, with the designating or defining of trade names in the industry which makes and sells the kinds of packings we have been here discussing as those trade names apply to some of the packings that have been before the Court?

A. I haven't inspected these particular catalogues, but I have seen many catalogues of that nature.

Q. Do you know the trade names that are applied?

(Testimony of Launcelot W. Hanson.)

A. To the particular things that are shown in the catalogues only.

Q. Looking at the gasket in Exhibit 17, Mr. Hanson, I will ask you whether or not that responds to the trade name of a U-packing [322] or the trade name of flange packing?

A. Well, by trade name, that is just what one particular manufacturer calls that.

Q. No, I am speaking of the industry generally. I have asked you whether or not the industry generally has trade names, and I think you answered it does; is that correct?

A. It has trade names for the particular things that that particular manufacturer makes.

Q. Well, but are those names common in the industry among all manufacturers or substantially all of them?

A. I don't know.

Q. You don't know. Do you know whether among the manufacturers and sellers of gaskets such as we have had before this Court that gasket from Exhibit 17 would be designated as a U gasket or packing?

A. No, because there is nothing shown like this.

Q. I didn't catch the answer.

A. There is nothing shown like this in any of the catalogues.

Q. You would not then designate that as a U packing or gasket; is that correct?

A. It might be one type of U gasket.

Q. You say that it might fairly be called one type of U gasket?

A. It might be.

(Testimony of Launcelot W. Hanson.)

Q. Do you say that it might fairly be called a flange gasket within that meaning as used in the trade? [323]

A. Well, as I say, there is nothing in the trade like this gasket.

Q. Well, would you say then that it may not be called a flange gasket within the meaning of that term as used in the trade?

A. It might be called a flange gasket because it has a flange on it.

Q. Within the meaning of that term as used in the trade?

A. Well, as I stated before, I don't know exactly what all the manufacturers in the trade call their gaskets.

Q. So that you don't know what a flange gasket is in the trade?

A. I know what some might call it. I don't say that all the trade calls it a flange gasket because I don't know the condition of the whole trade. I just know one particular catalogue.

Q. I see. But you do say that the operation of the gasket from Exhibit 17 and that from 47 and 48 is the same?

A. I didn't say the gaskets were the same. I said they operated in the same way.

Q. That was my question. And if I correctly understand you, that operation, taking my fingers as the two sides of the gasket, is the imposition of pressure between them which spreads them; is that right?

(Testimony of Launcelot W. Hanson.)

A. If there is any place for them to spread.

Q. Yes. At least they spread until they come in contact with the metal tube?

A. If they are already in contact they cannot spread. [324]

Q. Then they merely compress; is that right?

A. That is right.

Q. But the gasket from both Exhibits 17 and 47 and 48 operate in the same way in that manner under pressure?

A. They don't move, no. They contact—

Q. They stiffen up against the interior walls?

A. That is right.

Q. Now over my objection, Mr. Hanson, you gave some reasons for the formation of the groove in that Exhibit 17 and the way in which it is actually formed as you hold it in your hand there. I will ask you whether or not one of those reasons was that in rolling such a coupler sleeve it proved impracticable to form a flat backed surface for such a flange as this I hold in my hand?

A. On two sides.

Q. On two sides. It proved impracticable to do that, didn't it?

A. I didn't say impracticable. I said it is more difficult.

Q. It was more difficult to do that. And so for the sake of convenience in manufacturing an article it did not seem desirable to make that when you had to roll it?

A. That is right.

Q. I take it that the rolling process is very

(Testimony of Launcelot W. Hanson.)

much less expensive than any other process you can apply to make these things, is it not?

A. Well, we don't actually make them by rolling. We have other [325] methods. But it is a rolled steel product which it is made from.

Q. And it is more inexpensive to make them from that product than from any other applicable product, is it not?

A. More inexpensive to make them from a rolled steel product?

Q. Yes. A. I think so.

Q. In other words, to form a coupling similar to Exhibit 70 here would cost very much more money; isn't that right? Exhibit 70 is the tall one.

A. Yes.

Q. And when you say more difficult to form you mean through processes you use, out of rolled steel, a roller to receive the back end of this flanged gasket, and a corresponding surface here at the top of it, and some form of lip here to retain it, and when you say it is more difficult does that refer to more difficult to form it so as to make it tight?

A. No.

Q. No; just to form it at all?

A. That is right.

Q. Is it true that if such a groove to retain the exterior rim of the flange of this hat packing is not truly formed on the back side the structure will leak?

A. That is a relative term, truly formed. That

(Testimony of Launcelot W. Hanson.)

would depend upon the flexibility in the rubber capable of contacting irregularities. [326]

Q. But if there are any substantial irregularities or imperfections in the metal facing at the back side of this cup packing or flange packing, then the instrumentality is apt to leak in use, is it not? A. Under very low pressures.

Q. And if the imperfections be considerable then under high pressures?

A. No, it would be zero under high pressures.

Mr. Middleton: That is all.

Mr. Graham: That is all.

(Witness excused.)

Mr. Graham: That is all of our witnesses, if your Honor please. The plaintiff rests.

The Court: All right. Anything further?

Mr. Middleton: No, your Honor.

The Court thereupon fixed time for oral argument, and stated that briefs would not be received, but that points of law could be argued and supported by citation of authority.

Hearing of testimony was concluded on August 22, 1942, followed by oral argument on August 24 and 25, whereupon the cause was submitted. [327]

[Title of District Court and Cause.]

CERTIFICATE OF REPORTER

I, John S. Beckwith, hereby certify that I reported in shorthand the testimony and proceedings had upon the trial of the above entitled cause, beginning on Wednesday, August 19, 1942, before Honorable Leon R. Yankwich, Judge Presiding; that thereafter I prepared a typewritten transcript from my shorthand notes so taken, and the foregoing transcript, pages numbered 1 to 330, both inclusive, contains a full, true and correct record of all the testimony adduced in behalf of the respective parties, motions and objections made and rulings of the Court thereon, and all other oral proceedings had upon the trial of said cause, so taken by me in shorthand, and of the whole thereof.

Dated at Portland, Oregon, this 12th day of November, 1942.

JOHN S. BECKWITH
Court Reporter.

[Endorsed]: Filed Dec. 8, 1942. [331]

[Endorsed]: No. 10334. United States Circuit Court of Appeals for the Ninth Circuit. Sam Schnitzer, Harry J. Wolf, Rose Schnitzer and Jennie Wolf, individually, and as a co-partnership doing business under the name and style of Alaska Junk Company, Appellants, vs. California Corrugated Culvert Company, a corporation, and Leo T. Crowley, Alien Property Custodian of the United States, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed December 24, 1942.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 10334.

SAM SCHNITZER, HARRY J. WOLF, ROSE
SCHNITZER and JENNIE WOLF, individu-
ally, and as a co-partnership doing business
under the name and style of ALASKA JUNK
CO.,

Appellants,

vs.

CALIFORNIA CORRUGATED CULVERT CO.,
a corporation, and LEO T. CROWLEY, Alien
Property Custodian of the United States,
Appellee.

APPELLANTS STATEMENT OF POINTS
ON APPEAL

Come now the Appellants, Sam Schnitzer, Harry J. Wolf, Rose Schnitzer and Jennie Wolf, individually, and as a co-partnership doing business under the name and style of Alaska Junk Co., and make and file this their statement of the points upon which they intend to rely upon the appeal of this cause from the interlocutory decree, entered herein in the trial court on September 9, 1942, as follows:

I.

The District Court erred in declining to consider proof and offered proof of anticipation of the patent in suit through prior development of analo-

gous arts, including specifically the art of coupling hoses.

II.

The District Court erred in holding the patent in suit, and particularly Claim 3 thereof, valid when:

1. The so-called inventions and improvements, which are the subject matter of the patent in suit, do not involve or contain any patentable novelty, invention or discovery, and are not the statutory subject matter of invention, but on the contrary are mere aggregation, and are not useful.

2. The patent in suit, and particularly Claim 3 thereof, was void because of anticipation, and because it required no invention whatsoever, but only the ordinary skill of the art to which the alleged invention of the patent in suit appertains to make the same.

III.

The District Court erred in finding and decreeing that the Appellants have infringed Claim 3 of the patent in suit when:

1. By reason of the proceedings had and taken by the patentee in the patent office in the prosecution of the application for the letters patent in suit, the patentee limits himself and the claims of the patent to the use of a flange or hat packing, and in that, during the course of such prosecution of the application in the patent office, the patentee differentiated between such flange or hat packing and the "U" packing disclosed in United States letters patent to E. V. Anderson, patent numbered

811,812, issued February 6, 1906, in order to escape rejection of his claims in the patent office and to secure issue of the patent in suit, making the point in such differentiation that his invention employs a hat or flange packing, as distinguished from a "U" packing.

2. By reason of the construction placed by the Appellee, California Corrugated Culvert Co., a corporation, upon the scope and extent of the claims of the patent in suit, and particularly Claim 3 thereof, which construction was communicated to and acted upon by the Appellants in this suit, the Appellees are estopped to assert the claims of the patent in suit, and particularly Claim 3 thereof, in scope wide enough to hold the Defendants and Appellants guilty of infringement.

3. The accused structure of the Appellants employs and discloses a "U" or "V" packing, as distinguished from the flange or hat packing taught by the claims of the patent in suit, the structure and the modes of operation of the two types of packing being different.

4. It ignored claim language in finding infringement.

Respectfully submitted,

J. S. MIDDLETON

Attorney for Appellants

State of Oregon

County of Multnomah—ss.

Service of the foregoing Appellants Statement

of Points on Appeal is acknowledged at Portland, Oregon, this 28th day of December, 1942.

L. R. GEISLER

Of Attorney for Appellee
California Corrugated Cul-
vert Co., a corporation.

JAMES H. HAZLETT

Of Attorneys for Leo T.
Crowley, Alien Property
Custodian of the United
States.

[Endorsed]: Filed Dec. 31, 1942. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

Pursuant to the provisions of Section 6 of Rule 19 of the Rules of the above entitled Court, it is at this time:

Stipulated and Agreed by and between Sam Schnitzer, Harry J. Wolf, Rose Schnitzer and Jennie Wolf, individually, and as a co-partnership doing business under the name and style of Alaska Junk Co., by J. S. Middleton, their attorney of record, and the Appellee, California Corrugated Culvert Co., a corporation, by Wm. S. Graham, its attorney of record, and the Appellee, Leo T. Crowley, Alien Property Custodian of the United States, by James H. Hazlett, of his attorneys of record, that the foregoing and attached Appellants'

Amended Designation of Parts of the Record to Be Printed is designated by all of the parties to this stipulation as the agreed and final designation of parts of the record to be printed upon appeal herein; and the Clerk of the above entitled Court is authorized and requested by the stipulating parties to cause the record on appeal to be printed in accordance with the terms of the said attached and preceding Appellants' Amended Designation of Parts of the Record to Be Printed.

Dated this 9th day of April, 1943.

J. S. MIDDLETON

Attorney for Appellants

WM. S. GRAHAM

Of Attorneys for Appellee,
California Corrugated Cul-
vert Co.

JAMES H. HAZLETT

Of Attorneys for Appellee,
Leo T. Crowley, Alien
Property Custodian of the
United States

[Title of Circuit Court of Appeals and Cause.]

APPELLANTS' AMENDED DESIGNATION
OF PARTS OF THE RECORD TO BE
PRINTED

Come now the Appellants, Sam Schnitzer, Harry J. Wolf, Rose Schnitzer and Jennie Wolf, individ-

ually, and as a co-partnership doing business under the name and style of Alaska Junk Co., and make and file this their amended designation of the parts of the record which they think necessary for the consideration of the Court upon appeal of this cause as the parts of the record to be printed by the Clerk under the provisions of Section 6 of Rule 19 of the Rules of this Court:

1. Complaint (excluding Exhibit "A"), and at end of complaint insert: "For Exhibit "A" to complaint, see Trial Exhibit 11."

2. Answer.

3. Stipulation to permit Defendants to incorporate additional patents in their answer.

4. Order based on above stipulation.

5. Motion and notice of motion to add party plaintiff.

6. Supplement to complaint.

7. Order substituting Leo T. Crowley, Alien Property Custodian, as party plaintiff.

8. Stipulation relative to pretrial exhibits.

9. Order upon pretrial.

10. Opinion of the Court.

11. Exceptions by Defendants to proposed findings.

12. Findings of fact and conclusions of law.

13. Interlocutory decree.

14. Notice of appeal.

15. Bond on appeal.

16. Order extending time to file record on appeal.

17. Appellants' statement of points on appeal (filed in the District Court).

18. Appellants' designation of contents of record on appeal (filed in the District Court).

19. Order directing transmittal of original exhibits.

20. Certificate of the District Court Clerk to transcript.

21. Stipulation and order in the Circuit Court of Appeals regarding reproduction of exhibits.

22. Appellants' statement of points on appeal (filed in the Circuit Court of Appeals); eliminating, however, the designation of parts of the record to be printed, appearing as pages 3 and 4 of the same filing, excepting the signature of counsel on page 4, which should be shown; and eliminating also all of the title of said paper, excepting "Appellants' statement of points on appeal", which should be shown.

23. Appellants' amended designation of parts of the record to be printed (filed in the Circuit Court of Appeals), being this document, except Exhibit "A" hereto, which is to be duplicated in the printed testimony, as hereinafter provided.

24. The entire transcript of testimony, except for the following deletions and substitutions, to-wit:

a. Delete (inclusively) all material whatever appearing on pages 1 to 23, inclusive, and the first 20 lines on page 24, and substitute therefor the statement hereto attached as Exhibit "A".

b. Delete lines 16 and 17 on page 25.

c. Delete lines 10 and 11 on page 26.

d. Delete on page 31 from the sentence beginning, "I hope," on line 16 to the bottom of the page.

e. Delete on page 32 all material to and including the word "experiences," on line 8; the sentence beginning with, "If you want," on line 14 and ending with the word "testimony," on line 18; and all matter following to the end of the page from the beginning of line 21.

f. Delete all matter from the beginning of page 33 to and including the sentence ending with the word "present" on line 4; also all matter to the end of the page, beginning with the words, "To illustrate," on line 20.

g. Delete all matter on page 34.

h. Delete all of page 35 from the beginning of the page to and including the word "there" at the end of line 10; also all of lines 23, 24 and 25.

i. Delete all matter on lines 1 to 6, inclusive, on page 36.

j. Delete all of lines 12 to 18, inclusive, and lines 22 and 23 on page 46.

k. Delete all matter on page 135 from the beginning of line 5 to and including the word "instrument" on line 19.

l. Delete all matter on page 139 from the sentence beginning, "Why was," on line 7 to and including the end of the page.

m. Delete all matter on page 140.

n. Delete all matter on page 141, excepting the following:

“Mr. Middleton: I think in the light of the Court’s ruling I had best wait until morning before proceeding with that.

“The Court: I think that is all right.”

o. Delete all matter on page 142 from the beginning of the page to and including the word “names” at the end of line 16.

p. Delete all matter on page 153, beginning with the sentence commencing, “I referred,” on line 16 and to and including the end of the page.

q. Delete all matter on pages 154, 155 and 156.

r. Delete all matter on page 157 from the beginning of the page to and including the word “were” at the end of line 22.

s. Delete that portion of page 180 beginning with the sentence commencing, “I have read,” on line 8 and ending with the word “forty” on line 14.

t. Delete the matter beginning with the sentence commencing, “Why, I had,” on line 23 on page 181, and ending with the words “the principles” on line 1 on page 182.

u. Delete all matter on page 182, beginning with the words, “I forget,” at the end of line 1, and ending with the word “echo” on line 13.

v. Delete lines 7 to 11, inclusive, on page 183.

w. Delete the last line on page 187, all of page 188, and all matter on page 189 from the beginning of the page to and including the words “like that” on line 12.

x. Delete all matter on pages 278 and 279.

y. Delete lines 1 to 3, inclusive, and lines 11 to 22, inclusive, on page 280.

z. Delete all matter beginning at the beginning of line 16 on page 327, and ending at the end of page 330; and, in lieu of this deletion, substitute the following:

“The Court thereupon fixed time for oral argument, and stated that briefs would not be received, but that points of law could be argued and supported by citation of authority.

“Hearing of testimony was concluded on August 22, 1942, followed by oral argument on August 24 and 25, whereupon the cause was submitted.”

23. The following exhibits:

11, 22, 25, 27, 36, 39 and 40 shall be printed through the medium of incorporating in the printed record printed copies of such exhibits heretofore furnished to the Clerk; and

29, 32 and 37 shall be printed through the medium of incorporation in the printed record of photostatic copies of such exhibits.

The foregoing amended designation of parts of the record to be printed is made pursuant to the stipulation of the parties hereto attached and made a part hereof, and pursuant also to the order of this Court heretofore entered in the premises and directing the mode of printing exhibits, to which order reference is hereby made.

Respectfully submitted,

J. S. MIDDLETON,

Attorney for Appellants

[Endorsed]: Filed Apr. 26, 1943. Paul P. O'Brien,
Clerk.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

SAM SCHNITZER, HARRY J. WOLF, ROSE
SCHNITZER and JENNIE WOLF individu-
ally, and as a co-partnership doing business
under the name and style of ALASKA
JUNK CO.,

Appellants,

vs.

CALIFORNIA CORRUGATED CULVERT
CO., a corporation, and LEO T. CROWLEY,
Alien Property Custodian of the United
States,

Appellees.

APPELLANTS' BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

J. S. MIDDLETON,
1035 Pacific Building,
Portland, Oregon,
Attorney for Appellants.

WILLIAM S. GRAHAM,
111 Sutter Street,
San Francisco, California,

T. J. GEISLER,
L. R. GEISLER,
Platt Building,
Portland, Oregon,

CARL DONAUGH, United States District Attorney
for the District of Oregon,

J. H. HAZLETT, his Deputy,
United States Court Bulding,
Portland, Oregon,

Attorneys for Appellees.

FILED

JUL 6 - 1943

PAUL P. O'BRIEN,
CLERK

INDEX

	Page
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE CASE.....	3
SPECIFICATIONS OF ERROR.....	13
ARGUMENT OF THE CASE—SPECIFICATION I	15
ARGUMENT OF THE CASE—SPECIFICATION II	17
ARGUMENT OF THE CASE—SPECIFICATION III	39
CONCLUSION	46

TABLE OF CASES

A. O. Smith Corporation v. Lincoln Electric Co., 82 Fed. (2d) 226, 229, C.C.A. 6 (1936).....	37
Adam v. Folger, 120 Fed. 260, C.C.A. 7.....	40
Aleograph Co. v. Electrical Research Products, 55 Fed. (2d) 106 (C.C.A. 5).....	42
Atlantic Works v. Brady, 107 U.S. 192.....	17
Automatic Appliance Co. v. McNiece Motor Co., 20 Fed. (2d) 578, (C.C.A. 8)	42
Bingham Pump Company, Inc. v. Leonard L. Ed- wards, 118 Fed. (2d) 338, 340.....	15
Brown v. Piper, 91 U.S. 37.....	17
Bryant Electric Co. v. Electric Protection Co., 110 Fed. 215, 217 C.C. E.D. Pa. 1901.....	24

TABLE OF CASES

	Page
Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U.S. 399, 49 L. Ed. 1100.....	45
Continental Paper Bag Company v. Eastern Paper Bag Company, 210 U.S. 405, 52 L. Ed. 122 (1908)	38, 45
Cuno Eng. Corp. v. Automatic Devices Corp., 314 U.S. 84, 91.....	17, 26
Directoplate Corp. v. Donaldson Lithographing Co., 51 Fed. (2d) 199, 202.....	34
Dellar's Edition Walker on Patents (1937 Edition) Pages 1213 and 1214.....	38
Elvin Mechanical Stoker Co. v. Locomotive Stoker Co., 286 Fed. 309, 311, C.C.A. 3 (1923)	29
Fay v. Cordesman, 109 U.S. 408, 420, 27 L. Ed. 979.	40
Freeman Electric Co. v. Weber Electric Co., 262 Fed. 769 (C.C.A. 3).....	29, 42
General Chemical Co. v. Aluminum Co. of America, 11 Fed. (2d) 810 (D.C., W.D. Pa.) Aff. C. C.A. 3, 11 Fed. (2d) 813.....	42
General Electric Co. v. Wabash Clients Corp., et al., 304 U.S. 364, 369.....	44
General Motors Corporation v. Preferred Electric & Wire Corporation, 109 Fed. (2d) 615, 616 (C. C.A. 2) 1940.....	25
Goodyear Dental Vulcanite Co. v. Davis, 102 U.S. 222	41
Gottschalk Manufacturing Company v. Springfield Wire & Tinsel Company, 74 Fed. (2d) 583 (C.C.A. 1)	43
Hailes v. Van Wormer, 20 Wallace 353, 368.....	26
Hamilton Beach Manufacturing Co. v. P. A. Geier	

TABLE OF CASES

	Page
Co., 230 Fed. 430, 437, C.C.A. 7 (1916)	24
Hartman Furniture and Carpet Co. v. Banning, 59 Fed. (2d) 129, 131, C.C.A. 7 (1932)	22
Heald v. Rice, 104 U.S. 737, 754-756	17
Hicks v. Kelsey, 18 Wall. 670	17
Hotchkiss v. Greenwood, 11 Howard 248	17
John I. Paulding, Inc. v. Leviton, 45 Fed. (2d) 125, C.C.A. 2 (1930)	41
Jones v. Moorehead, 1 Wall. 155	17
Keystone Driller Co. v. Northwest E. Corp., 294 U. S. 42, 50, 79 L. Ed. 747, 752 (1935)	22
Ladd v. Walker, 7 Fed. (2d) 72, C.C.A. 3	42
Landry v. Rockwell, 45 Fed. (2d) 89, C.C.A. 1 (1930)	28
Lunati v. Barrett, 104 Fed. (2d) 313, 316 (6th Cir.)	43
McClain v. Artmayer, 141 U.S. 419, 423, 35 L. Ed. 800	40
McGill v. Whitehead & Hoag Co., 137 Fed. 97 C.C. N.J.	37
Penfield v. Chambers Brothers Co., 92 Fed. 630, 651 C.C.A. 6 (1899)	24
Pennsylvania Railroad v. Locomotive Co., 110 U.S. 490, 28 L. Ed. 222	17
Peterson v. General Seafood Corporation, 66 Fed. (2d) 459, 463, C.C.A. 1 (1933)	46
Phillips v. Page, 24 Howard 164-167	17
Pickering v. McCullough, 104 U.S. 310-317-318 (1881)	22
Pierce v. Mulford, 102 U.S. 112	17
Planing Machine Co. v. Keith, 101 U.S. 479-491 . .	17
Powers Kennedy Corporation v. Concrete M. & C. Co., 282 U.S. 175, 186, 75 L. Ed. 278, 286 (1930) .	22

TABLE OF CASES

	Page
Quick Action Ignition Co. v. Maytag, 39 Fed. (2d) 595, C.C.A. 8.....	42
Roberts v. Ryer, 91 U.S. 150.....	17
Sax v. Taylor Iron Works, 30 Fed. 835, 837, C.C., D. N.J. (1887), Aff. 199 U.S. 485, 37 L. Ed. 964..	24
Smith v. Magic City Kennel Club, 282 U.S. 784, 75 L. Ed. 707	41
Texas Rubber & Specialty Corporation v. D. & M. Machine Works, 81 Fed. (2d) 206, 208, C.C.A. 5 (1936)	40
Union Water Meter Co. v. Desper, 101 U.S. 332, 337, 25 L. Ed. 1024.....	40
United States Ozone Co. v. U. S. Ozone Co. of Ameri- ca, 62 Fed. (2d) 881, 889, C.C.A. 7 (1932).....	40
Vance v. Campbell, 66 U.S. (1 Black) 427, 17 L. Ed. 168	40
Westinghouse Electric & Manufacturing Co. v. Wag- ner Co., 129 Fed. 604, C.C. Mo.....	37
Wire Tie Mach. Co. v. Pacific Box Corp., 102 Fed. (2d) 543, 556, C.C.A. 9 (1939).....	30
Wood v. Peerless Motor Car Corp., 75 Fed. (2d) 554, 557 (C.C.A. 6, 1935).....	22, 37

In the United States
Circuit Court of Appeals
For the Ninth Circuit

SAM SCHNITZER, HARRY J. WOLF, ROSE
SCHNITZER and JENNIE WOLF individu-
ally, and as a co-partnership doing business
under the name and style of ALASKA
JUNK CO.,

Appellants,

vs.

CALIFORNIA CORRUGATED CULVERT
CO., a corporation, and LEO T. CROWLEY,
Alien Property Custodian of the United
States,

Appellees.

APPELLANTS' BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

STATEMENT OF JURISDICTION

Jurisdiction of the District Court: This is a suit
in equity brought originally by California Corrugated
Culvert Co., a California corporation, and Karl Lan-
ninger as Plaintiffs, against Sam Schnitzer, Harry J.
Wolf, Rose Schnitzer and Jennie Wolf, individually,

and as a co-partnership doing business under the name and style of Alaska Junk Co. as Defendants, for infringement of United States Letters Patent No. 1,747,942, which issued on February 18, 1930 to Karl Lanninger, the Plaintiff, California Corrugated Culvert Co., being licensee under an exclusive license to make, use and sell the patented invention for use for irrigation purposes within the United States, and the original plaintiff, Karl Lanninger, being the owner and holder of the rights and privileges originally inuring to him under the patent other than those included in the license to the plaintiff, California Corrugated Culvert Co. Therefore, jurisdiction herein is based upon the provisions of sub-section (7) of Section 41, Title 28, U.S.C.A. and the provisions of sub-section (fifth) of Section 371, Title 28, U.S.C.A. (See Complaint, Pages 2 to 7, inclusive; Answer, Pages 8 to 14, inclusive; Supplement to Complaint, Pages 21 and 22, inclusive; and Order upon Pretrial, Pages 30 to 34, inclusive, Transcript of Record.)

Jurisdiction of the Circuit Court of Appeals: This is an appeal from an interlocutory decree of the District Court made and entered on September 9, 1942, which interlocutory decree finds infringement and refers the cause to a master to assess damages. The interlocutory decree provides that the appellees herein are, the appellee, Leo T. Crowley, as Alien Property Custodian of the United States, the owner, and the appellee, California Corrugated Culvert Co., a corporation, the holder of an exclusive license under, United

States Letters Patent No. 1,747,942 for irrigation purposes in and throughout the United States of America, which license is in force and effect; that the appellants herein have infringed claim 3 of the letters patent in suit; that the appellants be enjoined from making, using or selling the alleged infringing device; that the appellees recover from the appellants the profits, gains and advantages which the appellants have received and which may have accrued to them by reason of infringement of claim 3 of the letters patent in suit; and that the cause be referred to Irving Rand, Esq., special master, to take the accounting.

This appeal is taken pursuant to the provisions of Section 225(b) and Section 227-a, Title 28, U.S.C.A. Notice of appeal and bond on appeal were duly filed on October 1, 1942.

STATEMENT OF THE CASE

The plaintiffs allege that the original plaintiff, Karl Lanninger, was the first and sole inventor of certain alleged inventions comprising, in combination, certain elements constituting an improvement in "pipe joint", used in combination with pipe, and as more fully set forth in the claims of the patent, though the designation of the patent is that it covers "pipe line"; that on February 18, 1930 the patent in suit was granted, issued and delivered to the original plaintiff, Karl Lanninger, upon his application, Serial No. 667353, filed in the United States Patent Office on October 8,

1923, a former application having been filed in the patent office of Germany on October 14, 1922; that the plaintiff, California Corrugated Culvert Co., a California corporation, is the owner and holder of an exclusive license within the United States of America, for the manufacture, use and sale of the patented invention for use in irrigation systems; that the last named plaintiff gave notice to defendants of the inventions and the letters patent aforesaid and infringement thereof by defendants and that defendants have infringed claim 3 of said patent, this being the only claim in suit, through manufacture and sale, within the District of Oregon, within six years prior to the filing of complaint and since the granting of the letters patent aforesaid, and without the license or consent of the plaintiffs or the original plaintiff, Karl Lanninger, of pipe joints embodying the characteristics of mechanical design and construction disclosed in said letters patent and claimed in claim 3 of said letters patent. Plaintiffs further allege that the defendants, unless restrained, will continue to make, use and vend such infringing devices and further infringe claim 3 of the patent. The original plaintiffs prayed for an injunction against the infringement and for an accounting of damages.

Reference has been made to the original plaintiff, Karl Lanninger, who is an enemy alien, resident in and a citizen of Germany. On June 18, 1942 by vesting order No. 27, the substituted plaintiff and present appellee, Leo T. Crowley, as Alien Property Custodian

of the United States of America, became vested with all of the right, title and interest then and theretofore held and owned by the original plaintiff, Karl Lanninger, in and to the letters patent in suit; and by order of the trial court entered herein on August 10, 1942, said Leo T. Crowley, as Alien Property Custodian as aforesaid, was substituted as party plaintiff herein for the original party plaintiff, Karl Lanninger.

The appellants, by their answer, allege that such Letters Patent numbered 1,747,942 never validly issued from the United States Patent Office for the reasons that the pipe joint set forth in the claims of the patent, and all thereof, is not the statutory subject matter of invention, it is not a new or useful article or combination within the statutes in such case made and provided, and the alleged article or combination is not patentable subject matter under such statutes, and that the claims of said patent, and all thereof, purport to cover and cover a mere aggregation of elements; and that in view of the knowledge and practice of the art at and prior to the date of filing of the application for letters patent in the United States Patent Office for the patent in suit, it required no invention whatsoever, but only the ordinary skill of the art to which the alleged invention appertains, to make the same, and that the alleged inventions set forth in the claims of the patent, and each thereof, and every material and substantial part thereof therein claimed as new, were invented by others prior to the alleged invention thereof by the original plaintiff, Karl Lanninger, and were

shown and described in printed publications in the United States before the alleged invention thereof by the patentee of the patent in suit and for more than two years prior to the filing of the application for the patent in suit, and that the letters patent in suit were issued by the United States Patent Office without due investigation, and that an important part of the relevant prior art was overlooked, and other parts of the prior art were improperly applied and construed, by reason whereof, the Commissioner of Patents exceeded his legal authority in granting the letters patent in suit, and that the state of the art before and at the time of the alleged invention and/or application for letters patent resulting in the patent in suit, was such that to be valid, the claims of the patent in suit must be so narrowly construed as to be incapable of being validly applied to pipe joint construction, and that in view of the function, structure and purpose of the alleged invention, as claimed in the letters patent in suit, the appellees cannot seek for nor obtain a construction of the claims of the patent in suit, or any of them, sufficiently broad to cover or include within their purview, the construction employed by the appellants, and that by reason of the proceedings had and taken in the United States Patent Office in the prosecution of the application, whereon ultimately issued the patent in suit, the appellees herein are estopped from maintaining the same in such scope as to cover or embrace any apparatus which the appellants may have made, used or sold. The letters patent referred

to in the answer of the appellants as printed publications, are a list of prior United States patents (which list was amplified before trial with leave of the trial court) and such list of patents appears at page 36 of the Transcript of Record.

The appellants, by their answer, admit manufacture and sale, within the District of Oregon and within six years prior to the commencement of this proceeding and after the issue of the patent in suit, and without the license or consent of the appellees, of certain pipe joints, which pipe joints, however, they allege do not infringe claim 3 of the patent in suit.

This suit involves claim 3 only of the Lanninger patent No. 1,747,942. Claim 3 reads as follows: (Page 386, Transcript of Record)

“A pipe joint in connection with pipes one of which has an unthreaded end, a rigid coupling sleeve for coupling said pipes into which said unthreaded end extends, said sleeve having an interior annular groove in the inner surface, a packing of elastic material in said coupling sleeve consisting of a free cylindrical part frictionally enclosing the unthreaded pipe end and having a flange frictionally retained in the groove of said sleeve, and means for hingedly securing said sleeve on the pipe having the unthreaded end.”

Claim 3 is one of six claims allowed in the patent as issued.

It will be observed that all six of the claims of the patent are combination claims; all include as one of the designated elements of the combination, a pack-

ing of elastic material having a flange; and claim 3 differs from the remaining five claims of the patent in that it provides for retaining the flange of the packing *frictionally* in the sleeve, whereas, the remaining five claims provide for *clamping* the flange in the sleeve. This characteristic, taught by claim 3 of the patent in suit, of "frictionally retaining the *flange* in the groove of the sleeve" is the root from which the claim of infringement grows.

The art of coupling pipes through the medium of "bell and spigot" joints is, of course, very old. It probably has its first exemplification in the cast-iron sewer pipe joint, with which we are all familiar, where oakum or similar material and molten lead has long been the accepted medium for sealing the joint. In this type of joint, the end of neither pipe to be joined is threaded; but the male, or spigot end, is inserted into the female, or bell end, and then an appropriate sealing medium is employed.

Lanninger applied for and obtained the patent in suit, using a combination of known elements (including his "flange packing") in accomplishing his result. His device, if useful at all, which is not conceded, purported to provide an advantage in his pipe joint, in that, the joint being flexible to a degree, two adjoining pipes might be laid at angles one to the other, or moved to some degree while in use without breaking the seal. But others had provided similar, and in one instance, practically identical, means of accomplishing the same result, before Lanninger filed his patent application;

and after the patent in suit issued, others devised yet different means for accomplishing the same result.

Among these later inventors was one Ralph H. Pierce, of Eugene, Oregon.

On January 30, 1934, there issued from the United States Patent Office United States Letters Patent No. 1945293 to the said Ralph H. Pierce upon his application No. 568582, filed in the patent office on October 13, 1931. The Pierce patent had but a single claim which reads as follows :

“In a pipe joint, a sleeve member, an annular internal semi-circular section groove in said sleeve member, a cup-rubber adapted to bear in said groove and having approximate quadrants of said bearing of different radii, said cup-rubber including a dependent feather-edge lip to said cup, being thin and stretchable and adapted to conform closely to a rough surface of an inserted pipe prior to the application of internal fluid pressure.”

It will be observed that the particular characteristic of the Pierce patent is the shape and action of the packing member. It will also be observed that Pierce did not claim a means for locking the two ends of the pipe together. The Pierce patent (Exhibit 22) appears at Pages 388 to 390, inclusive, of the Transcript of Record.

The appellants in this case have purchased from the said Ralph H. Pierce pipe couplers manufactured by him and claimed to be made responsive to the disclosure of his patent No. 1945293, and have in some instances attached to such couplers, and the pipes used

in connection therewith, as a means of holding or locking the pipes together, a latch type of lock exemplified upon physical Exhibits 3 and 48. In other instances, the appellants have cut a notch in the lip, constituting the female end of the Pierce coupler, designed to receive the unthreaded or male end of pipe, and have welded upon the unthreaded end of pipe so to be received, a metal hook designed to enter such notch and, upon rotation, to engage with the lip constituting the female end of the coupler, thus forming a locking means to prevent the two pieces of pipe from pulling apart under pressure. This notch and its engaging hook are exemplified on physical Exhibits 8 and 47. See, also, Pages 31 and 32, Transcript of Record.

At the time that Lanninger filed his application in the patent office in 1923, and for very many years prior thereto (the oldest exact date appearing in this record from the various dates endorsed on Exhibits 46—a, b, c, d, e, f, being 1908) there had been in common and accepted use among manufacturers of and dealers in packings similar to that disclosed by the claims of the patent in suit and that in the alleged infringing device, and within the United States of America, certain well established trade name designations for such packings. The patentee Lanninger states expressly that his packing has a "flange". Packings responding to the shape and other characteristics of the packings described in claim 3 of the patent in suit, and disclosed by the drawings of the patent in suit, were and are known as "flange" or "hat" packings (see

Exhibits 97, 98 (Page 58 thereof), 99, 100 (Page 397 thereof), 101 (Page 52 thereof), 102 (Page 40 thereof), 103 (Pages 26 and 27 thereof), 104 (Pages 5, 6 and 8 thereof and 46—a, b, c, d, e and f.) See also the testimony of the witnesses Baldwin Vale, Pages 146, 147 and 163, and McDougall, Pages 206 and 207, and Finkbeiner, Pages 256 and 267-268, Transcript of Record.

Packings responding to the shape and other characteristics of the packing described in the claim of the Pierce patent No. 1945293 and shown in the drawings thereof, were and are known to the trade as "V" or "U" packings (see the exhibits mentioned in the next preceding paragraph and the testimony of the witnesses there named) Pages as above, Transcript of Record.

Appellees contend (and the District Court sustained them in this contention in the interlocutory decree) that the "U" or "V" type packing described in the Pierce patent No. 1945293 and included in the combination in the devices made and sold by the appellants, operates in the same manner to accomplish the same result in the same way as the flange packing described in claim 3 of the patent in suit, and that the pipe joint combinations made and sold by the appellants, including the two different means of locking the pipe ends hereinbefore detailed, therefore infringe claim 3 of the patent in suit. Appellants resist this contention and assert even should the patent in suit be held valid that by reason of the express language of claim 3 of the patent in suit as the same is ex-

plained and elaborated upon by the specifications of the patent in suit and the remaining five claims thereof and the drawings thereof; and by reason of the actions of the patent office examiners during the prosecution of the application for the patent in suit and the responses thereto by the patentee; and by reason of subsequent definition by the appellee, California Corrugated Culvert Co. of the scope of the claims of the patent in suit, the appellees herein may claim, as protected by the scope of claim 3 of the patent in suit, only combinations otherwise responding to the language of the claim and incorporating as one of the elements thereof a *flange* packing; that a flange packing on the one hand and a "U" or "V" packing on the other do not operate in the same manner; and that, therefore, there can be no infringement under the facts in this case.

Additionally—and this is most important—the facts here disclose (Pages 332 and 333 of the Transcript) that during all of the time since issue of the patent in suit, on February 18, 1930, only some *six* pipe joints actually including in the structure thereof a *flange* packing have been made by the appellees herein or either of them, when contrasted with many thousands of pipe joints made and sold annually by appellee, California Corrugated Culvert Co. wherein a round rubber ring or a "U" packing have been incorporated (see Page 333, Transcript); and the appellants, therefore, charge that the combination described in claim 3 of the patent in suit is not useful; that the patent in

suit is but a "paper patent"; and that its scope must therefore be strictly construed.

SPECIFICATIONS OF ERROR

The appellants rely upon each of the specifications of error heretofore assigned by them, as follows:

I.

The District Court erred in declining to consider proof and offered proof of anticipation of the patent in suit through prior development of analogous arts, including specifically the art of coupling hoses. (This ruling appears at Pages 197-204, inclusive, Transcript of Record.)

Transcript of Record, pages 372 and 373.

II.

The trial court erred in holding the patent in suit, and particularly claim 3 thereof, valid, when

(1) The so-called inventions and improvements which are the subject matter of the patent in suit do not involve or contain any patentable novelty, invention or discovery, and are not the statutory subject matter of invention, but on the contrary, are mere aggregation, and are not useful.

(2) The patent in suit, and particularly claim 3 thereof, was void because of anticipation and because it required no invention whatsoever, but only the ordinary skill of the art to which the alleged invention of patent in suit appertains, to make the same. (Transcript of Record, Page 373.)

III.

The District Court erred in finding and decreeing that the appellants have infringed Claim 3 of the patent in suit when:

1. By reason of the proceedings had and taken by the patentee in the patent office in the prosecution of the application for the letters patent in suit, the patentee limits himself and the claims of the patent to the use of a flange or hat packing, and in that, during the course of such prosecution of the application in the patent office, the patentee differentiated between such flange or hat packing and the "U" packing disclosed in United States letters patent to E. V. Anderson, patent numbered 811,812, issued February 6, 1906, in order to escape rejection of his claims in the patent office and to secure issue of the patent in suit, making the point in such differentiation that his invention employs a hat or flange packing, as distinguished from a "U" packing.

2. By reason of the construction placed by the appellee, California Corrugated Culvert Co., a corporation, upon the scope and extent of the claims of the patent in suit, and particularly Claim 3 thereof, which construction was communicated to and acted upon by the appellants in this suit, the appellees are estopped to assert the claims of the patent in suit, and particularly Claim 3 thereof, in scope wide enough to hold the defendants and appellants guilty of infringement.

3. The accused structure of the appellants employs and discloses a "U" or "V" packing, as distinguished from the flange or hat packing taught by the claims of the patent in suit, the structure and the modes of operation of the two types of packing being different. —

4. It ignored claim language in finding infringement. (Transcript of Record, Pages 373 and 374.)

ARGUMENT

Taking the foregoing matters up in order :

SPECIFICATION I.

As will appear from the pretrial order Page 36, Transcript, numerous patents were cited in anticipation of the claims of the patent in suit. Many of these patents do not appear in evidence nor in the record. The reason lies in the ruling of the court (Pages 197-204, Transcript of Record) that the court would not consider in anticipation prior inventions in the art of coupling hoses. Though not supported by the record (for there is no record on these patents because of the court's ruling) many of the patents cited were patents on devices for the coupling of hoses. This court has ruled, in *Bingham Pump Company, Inc. vs. Leonard L. Edwards*, 118 Fed. (2d) 338 (340) :

"It is clear that Appel did not conceive of the use of his device as appellee conceives his. How-

ever, if Appel's device can be used for the same purpose, it is immaterial whether he conceived of that use. *Dailey v. Lipman Wolfe & Co.*, 9 Cir. 88 F. (2d) 362, 364 and authorities cited. Therefore, the fact that Appel did not know that his device could be used for the same purpose as appellee's device does not preclude the defense of anticipation."

It is obvious that a hose is but a flexible pipe and a pipe but a rigid hose. For example, observe the drawings of the patent to Berry, Fig. 1 of the drawings (Page 414, Transcript) where, in effect, a pipe becomes a hose. The means employed by one man to couple a hose might certainly be employed by a second to couple a pipe; and, to the writer, there would have been no invention involved in so doing, even in the absence of this court's ruling on the lack of necessity for perception on the part of the inventor of the coupling of hoses that his invention might be also used for the coupling of pipes. It is obvious that the trial court, by this ruling, precluded the appellants from development of the defense of anticipation of the patent in suit through the medium of development of the teachings of anticipatory patents for the coupling of hoses.

"The question therefore is whether employing as the forward truck of a locomotive engine with fixed driving wheels, a truck already in use on railroad cars has the novelty requisite to sustain a patent. * * * *

It is settled by many decisions of this court which it is unnecessary to quote from or refer to in detail that the application of an old process or machine to a similar analogous subject with no

change in the manner of application and no result substantially distinct in its nature will not sustain a patent even if the new form of result has not before been contemplated.”

Pennsylvania Railroad v. Locomotive Co., 110 U.S. 490, 28 L. Ed. 222.

See also Hotchkiss v. Greenwood, 11 Howard 248.

Phillips v. Page, 24 Howard 164-167.

Jones v. Moorehead, 1 Wall. 155.

Hicks v. Kelsey, 18 Wall 670.

Roberts v. Ryer, 91 U.S. 150.

Planing Machine Co. v. Keith, 101 U.S. 479-491.

Pierce v. Mulford, 102 U.S. 112.

Heald v. Rice, 104 U.S. 737, 754-756.

Brown v. Piper, 91 U.S. 37.

Atlantic Works v. Brady, 107 U.S. 192.

Cuno Eng. Corp. v. Automatic Devices Corp., 314 U.S. 84, 91.

SPECIFICATION II.

(1) As appears from Page 24 of Exhibit 105, being a treatise upon “Water and Gas Works Appliances and Pumping Machinery”, published in 1901, the bell and spigot joint wherein the male end of an unthreaded pipe is received within the bell of a similarly unthreaded pipe end is old, dating back at least to the year 1820. The patent in suit employes this basic method of bringing the two pipe ends together. The patent to McGowan, Exhibit No. 25, issued December 2, 1879, discloses the same structure between the parts A and B in the drawing (Figure 3) (Page 392, Transcript of Record). The patent to Jones, Exhibit No. 27 (Page 396, Transcript of Record), issued July 25, 1911, dis-

closes the same structure between the parts 19 and 14 (Figures 3 and 4 of the drawings). The patent to Close, Exhibit No. 29 (Page 403, Transcript of Record) issued November 5, 1901, discloses the same structure between the parts D and B (Figure 1 of the drawings). The patent to Gorter, Exhibit No. 32 (Page 409, Transcript of Record), issued April 6, 1897, discloses the same structure between the parts B and A (Figure 1 of the drawings). The patent to Berry, Exhibit No. 36, (Page 416, Transcript of Record) issued February 5, 1918, discloses the same structure between the parts C and D (Figure 4 of the drawings). The patent to Anderson, Exhibit No. 40 (Page 438, Transcript of Record), issued February 6, 1906, discloses the same structure between the parts 6 and 5 (Figure 4 of the drawings). The patent to Serrell, Exhibit No. 39 (Page 430, Transcript of Record), issued January 28, 1919, discloses the same structure between the parts a and 1 (Figures 1 and 2 of the drawings).

As appears from the specifications in the patents to McGowan, Jones, Close, Gorter, Berry, Anderson and Serrell, above referred to, all of these inventors employed a flexible and, in all cases, elastic packing member to seal their joints. So, this feature of the combination of claim 3 of the patent in suit is also old in a broad sense.

In McGowan, above referred to, we find the annular groove in which the packing is retained at the figure K in figure 3 of the drawings and also described in the specifications; in Jones, we find the flange of

the flexible packing member (No. 22 in figure 5 of the drawings) within a joint constituting an annular groove. In Close, we find the flexible packing member described in the specifications and shown at E of figure 1 of the drawings. In Gorter, we find the annular groove described in the specifications and shown at E of figure 1 of the drawings. In Berry, we find the annular groove between the clamping rings p and q, figures 3 and 4 of the drawings, this time an external rather than an internal annular groove. In Anderson, we find the annular groove described in the specifications as a "suitable seat"; and it is exterior on the male portion instead of interior on the female portion. It is shown at 7 and 8 of figure 4 of the drawings, though these numbers apply to the packing and the spring therein contained. In Serrell, the annular groove is of a different shape and is represented in the recess between 1 and 2 in figure 3 of the drawings. So, the annular groove is old and appears in the old art in both the interior and exterior form.

The characteristics of the elastic packing as set forth in claim 3 of the patent show it to consist of "a free cylindrical part frictionally enclosing the unthreaded pipe end and having a flange frictionally retained in the groove of said sleeve". In McGowan, at K in figure 3 of the drawings, is shown his packing which he calls in his specifications a "gasket or cushion M", within the annular groove K, and which he says is securely fastened in the groove by pressure or by original formation with the flange. (Page 1, Column

2, Paragraph 3 of the specifications.) His flange is reversed and extends inwardly rather than outwardly of the gasket or packing; and the free cylindrical part does not enclose the unthreaded pipe end, but abuts a shoulder. In Jones we find in his specifications the gasket which he describes as having a base flange wherefrom a flexible part protrudes; and in the structure he discloses this flexible part fits within the male member instead of frictionally enclosing the end thereof. In other words, the same parts, but reversed in their operation. Close does not use the flange gasket or packing, but uses the "U" packing instead. (Figure 1) Berry discloses the flange packing at o in figures 3 and 4 of the drawings frictionally enclosing the part L and also susceptible of closing upon the part S in reverse action. Anderson uses the "U" packing as distinguished from the flange packing. Serrell discloses the flange packing and describes it in his specifications. (Page 1, Lines 64 to 71) It frictionally encloses the unthreaded part a of the faucet (figure 2 of the drawings). So, the flange packing and its frictional retention in the groove of the sleeve and its characteristic of frictionally enclosing the unthreaded pipe end is old.

The only remaining characteristic disclosed in claim 3 of the patent in suit is "means for hingedly securing said sleeve on the pipe having the unthreaded end". McGowan discloses this characteristic in two places in his patent, between A and B and between B and C in figure 1. Jones discloses a lock (figure 2, at 7, 8, 9, 10, 12 and 13 of his drawings) and he de-

scribes this in detail in his specifications (Lines 65-70, Page 1). Except that it includes the spring 10, it is very like the lock exemplified upon physical exhibits 3 and 48. Close employed no lock. Gorter discloses a very complicated locking device which he is careful to state in his specifications will not interfere with the rotary movement of the joint. In other words, it leaves flexibility. Berry provides a somewhat complicated locking device which permits full flexibility of the joint (i. e. hinged) which he describes at length in his specifications. (Page 2, Lines 18 to 29) Anderson provides a trunnion locking device at 9 of figure 4 of his drawings, and describes it briefly in his specifications. (Page 1, Line 54) Serrell provides a rigid locking device through the medium of the set screws, 6 in his figures 1 and 2, though by manual application to these set screws by a screw driver, his joint can be made movable while in use and service. So, recapitulating, all of the elements described in claim 3 of the patent in suit are in themselves old; they appear in even that limited portion of the prior art which has here been admitted in evidence in varied combinations; and it assuredly required no inventive genius to reassemble known factors commonly used together in the older art to arrive at the result described in claim 3 of the patent in suit. Aggregation only is involved. All of the parts, of necessity, produce their several results in the old and settled manner, as may be readily observed from their uses by prior inventors; and no new or useful result which is a joint product of the elements of

the combination and something more than the aggregation of the old results is involved. And under these circumstances, there is no invention.

As said by the Court in *Wood vs. Peerless Motor Car Corp.*, 75 Fed. (2d) 554 at Page 557 (C.C.A. 6, 1935)—and the language of the Court is exactly designed to describe the situation here before this Court—

“All that is here shown is a combination of elements old in the art, and combined in an old environment. It was no more than a judicious selection from the devices in the prior art, each designed and utilized to accomplish its individual purpose at a time and in a place where such function is necessary for the operation of the whole. This has been repeatedly held by this Court not to constitute invention.”

See also to the same effect :

Powers Kennedy Corporation v. Concrete M. & C. Co., 282 U.S. 175, 186, 75 L. Ed. 278, 286 (1930).

Keystone Driller Co. v. Northwest E. Corp., 294 U.S. 42, 50, 79 L. Ed. 747, 752 (1935).

Hartman Furniture and Carpet Co. v. Banning, 59 Fed. (2d) 129, 131 (C.C.A. 7) (1932).

Pickering v. McCullough, 104 U.S. 310-317-318 (1881).

(2) This specification is covered by the argument on the foregoing point, excepting as to the matter of anticipation. On this point, reference is made to the patent to Jones, Exhibit 27 (Page 395, Transcript of Record); and here, we have all of the elements enumerated in claim 3 of the patent in suit. Referring to

figure 2 of the Jones drawings, and as amplified by his specifications, we find a hose joint in connection with hose, one of the ends of the joint (No. 19 in Figure 4 of the drawing) having the unthreaded end, the rigid coupling sleeve for coupling the ends of the coupling (figure 14 of Figure 3 of the drawings) into which the unthreaded end extends, the interior annular groove in the inner surface (between figure 15 and the end of the part 19 in figure 2 of the drawing) the packing of elastic material (figures 21 and 22 in figure 5 of the drawings) in the coupling sleeve consisting of a free cylindrical part 21 which frictionally engages in the unthreaded pipe end from the inner instead of from the outer diameter, the packing having the flange 22 frictionally retained in a groove in the sleeve and means for hingedly securing the sleeve on the unthreaded end (figures 7, 8, 9, 10, 12 and 13 in figure 2 of the drawing). Variant factors are:

1. The coupling is a hose coupling, not a pipe coupling. This factor has been discussed.

2. The elastic packing engages the unthreaded pipe end from the inner diameter instead of upon the outer diameter, as disclosed in claim 3' of the patent in suit.

The result, so far as the packing is concerned, is the same; for either from the inner diameter or the outer diameter, the packing still seals the joint by the application of fluid pressure.

Mere reversal of parts producing no new result does not constitute invention.

Hamilton Beach Manufacturing Co. v. P. A. Geier Co., 230 Fed. 430, 437 (C.C.A. 7) (1916).

Penfield v. Chambers Brothers Co., 92 Fed. 630, 651 (C.C.A. 6) (1899).

Sax v. Taylor Iron Works, 30 Fed. 835, 837, C.C., D. N.J. (1887), Aff. 199 U.S. 485, 37 L. Ed. 964.

So, also, a mere reversal of movement of the same parts of an old device does not constitute invention if the reversal is made without change of parts or the function of parts.

Bryant Electric Co. v. Electric Protection Co., 110 Fed. 215, 217, C.C. E.D. Pa. 1901.

It becomes obvious that upon the reference to Jones alone, and had the trial court not ruled as he did concerning admissibility, when concerning anticipation, of prior patents for the coupling of hoses, claim 3 of the patent in suit must have been held invalid for anticipation, and this litigation would be at an end.

The Berry patent, Exhibit 36, discloses the pipe joint in connection with pipes, one of which has an unthreaded end, the rigid coupling sleeve, the flange packing (with flange reversed), the annular groove, this time on the exterior of the reduced portion of the pipe extending into the bell, the packing of elastic material having a reversed flange frictionally retained in the groove and, in the form of a universal joint, means for hingedly securing the sleeve on the pipe having

the unthreaded end. In other words, in this structure, all of the elements of claim 3 of Lanninger are present, though some of the parts are reversed. The Berry patent issued February 5, 1918.

So, when all is said and done, the patentee Lanninger did nothing more (and this is true of all of the claims of the patent, including claim 3) than to assemble old and known elements previously assembled in varied (and, in the case of Jones, practically the identical) combinations, all employed for the same general purpose, in what he designated as his "invention". And such procedure on the patentee's part is far from measuring up to the standard set by the courts as the measure of invention. The following quotation from the language of the court in *General Motors Corporation v. Preferred Electric & Wire Corporation*, 109 Fed. (2d) 615, 616 (C.C.A. 2) 1940, though proceeding on the "flash of genius theory", sets a far higher standard:

"They made and tried out a great many different forms, and came down at last to that which seemed to stand up the best. At least there is no evidence that any higher abilities were demanded than intelligent, well-trained and persistent experiment, acting in the light of the defects which past experience had developed. Perhaps, such qualities are as well worth a patent as sudden flashes of genius; perhaps, indeed, in the long run they are more deserving; but the prize does not go to success so achieved; something more out of the common is demanded."

In *Hailes v. Van Wormer*, 20 Wallace 353, 368, the court says:

“It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention.”

In the devices described in claim 3 of the patent in suit, the spigot end of the pipe still enters the bell, the packing seals the joint permitting movement, and the locking means prevents the parts from blowing apart in use. Each element still performs its own and old functions in its old and own way; and nothing new results. It is not even here necessary to apply in its entirety the “flash of genius” test laid down in *Cuno Engineering Corporation v. Automatic Devices Corporation*, 314 U.S. 84, 90, 91, 92.

Turning now to the “usefulness” of the patented device, we find that the appellees have in evidence as their Exhibit 70 a model of the combination disclosed by claim 3 of the patent in suit; and both appellants and appellees concede this exhibit to be a correct model exemplifying the disclosures of the said Claim 3 and of the drawings of the patent in suit. It is a heavy model,

well and expensively made. But it carries with it obvious evidence of the reasons why it could not succeed commercially from the standpoints of its weight and the expense involved in casting and machining the metal parts. And it appears from the stipulations and admissions of counsel for the appellees that no more than half a dozen similar couplers were ever made (Page 332, Transcript of Record).

The appellee, California Corrugated Culvert Co., however, has made, as appears by the stipulation of counsel (Page 333, Transcript of Record) and sold many thousands per year of couplers embodying the characteristics of the Exhibit 17. It is because of this fact that the appellees claim utility and the resulting commercial success for claim 3 of the patent in suit. And, if the Exhibit 17 does in fact exemplify in concrete form the disclosures of claim 3 of the patent in suit, then the appellees are justified in such contention. If it does not exemplify in concrete form the disclosures of claim 3 of the patent in suit but does exemplify instead the various elements described in claim 3 of the patent in suit *less the flange* packing there described, and substitutes for such flange packing another and different instrumentality, then there has never been a reduction to actual use or any beneficial or commercial employment of the combination described in claim 3 of the patent in suit; and it follows by necessary reasoning that the device described in such claim of the patent has not been useful and so was not initially the subject matter of invention with-

in the language of the statute, and so the claim is but a paper claim and is now void for lack of utility. And lack of commercial success goes far to discredit the value of the "invention". *Landry v. Rockwell*, 45 Fed. (2d) 89. C.C.A. 1, 1930.

Therefore, we come to consider whether or not Exhibit 17 does indeed portray in concrete form the various elements disclosed by the language of claim 3 of the patent in suit. It may be conceded that it does portray all of those elements excepting the "flange" packing. On this point, the witnesses Vale and Hanson maintain and insist that the packing exemplified in Exhibit 17 is indeed a "flange" packing. Confronted with the Exhibits 97, 98, 99, 100, 101, 102, 103 and 104, the witness Vale squirms through a very unconvincing discourse (Pages 146 to 162, inclusive, Transcript of Record) to the effect that a "flange" packing is a "U" packing and a "U" packing is a "flange" packing; and the witness Hanson takes refuge in a sudden lack of exact familiarity with trade designations of packings when this subject comes up for discussion (Pages 364 to 366, Transcript of Record). The witness McDougall (Pages 226 & 227, Transcript) testifies without qualification that the packing exemplified in the Exhibit 17 is not a "flange" packing, but is a "U" or "V" packing. It remains but for the court to compare the packing in Exhibit 17 with the cuts and cross sections of "U" packings as disclosed in Exhibits 46A to 46F, inclusive and 97 to 104, inclusive, to arrive at the actual fact. The packing is a "U" pack-

ing and not a "flange" packing; the combination exemplified in physical Exhibit 17 which is the commercially successful product does not include the "flange" packing, one of the essential elements of claim 3 of the patent in suit; and any claims for commercial success of the "invention" of the patentee Lanninger must rest in the half dozen couplers which it is conceded have at some time in the past been made to the model of Exhibit 17 and which actually incorporated in their structure the flange packing. The patent is but a paper patent.

The witness Hanson (Pages 359, 360, 367 and 368, Transcript of Record) gives a reason for the variance. He does not say that it proved impracticable in fact to build couplers incorporating all of the elements of claim 3 of the patent in suit on a commercial scale; but he does say that because of the rolling processes involved in manufacture, it proved more practicable to build couplers employing a different type of packing, namely that exemplified in Exhibit 17. A comparison of Exhibits 70 and 17 and the obvious differences in manufacturing requirements necessary to produce them well bears the witness out in this particular.

This state of facts makes apropos here the statement of the Court in *Elvin Mechanical Stoker Co. vs. Locomotive Stoker Co.*, 286 Fed. Page 309 (311) C.C.A. 3, 1923:

"The Pennsylvania Railroad which has a shop right to manufacture it, has made but one, and there is no proof that the plaintiff company,

which now owns the patent, or the patentee, have ever manufactured any, although the device is some 14 years old; the patent having been applied for in 1908. Such being the fact, we are justified in holding that Gee will receive all the patent protection to which he is entitled by confining his claims to the particular structure he disclosed and to the mechanical equivalents of its parts, and declining to construe his claims in any broad way to cover other devices whose commercial success in the art lies, *not in the fact that they adopted his disclosures, but that they departed from them.*"

The same rule is stated by this Court in *Wire Tie Mach. Co. vs. Pacific Box Corp.*, 102 Fed. (2d) 543 (Page 556) C.C.A. 9 (1939).

SPECIFICATION III.

1. Turning now to the prosecution in the patent office of Lanninger's application for letters patent, it will first be observed that this prosecution endured from the filing of the application to the issue of the letters patent, for between six and seven years (October 8, 1923 to February 18, 1930).

In the original petition (5th page, but numbered "1" of Exhibit 45, the file wrapper and contents upon the Lanninger patent application), the patentee states that the "salient feature" of the invention consists in that the coupling sleeves are rigid and have cups of elastic material, the neck of each cup fitting tightly on the corresponding pipe end, said cups having further *each a flange which is clamped in the casing*. In the very inception of his application, he specifies the

flange as a part of the *salient feature*. Later, in the same paragraph, he describes the flange. His description follows:

“The very strong vertical flange on the packing cup permits of a specially simple fixation as it is inserted and clamped in a groove of the coupling sleeve.”

So, Lanninger's flange was *robust, strong, vertical and clamped* in a groove of the coupling sleeve. This was his invention as he came with it to the patent office. True, he says that the invention is not confined to any strict conformity with the showing of the drawings, but may be embodied in any manner which does not make a *material* departure from the *salient feature* of the invention. And, in his own words, the salient feature of the invention incorporated the very *strong, vertical flange, clamped* in a groove of the coupling sleeve.

We follow him now through his more than six year course through the patent office (see file wrapper and contents, Exhibit 45) and always as he proceeds, we discover that he continues the stressing of that flange.

It is true that the examiner, in the action dated March 6, 1924, cites the Jones and Berry patents with, notably, other patents on hose connections; but he cites these, in his own words, only in a “cursory” manner.

When we come to the action of the examiner dated August 23, 1928, we discover that claims 12 and 13

are rejected on Anderson. Of these claims, claim 13 is the present claim 3 in suit. In response to this action, the applicant, by his filing of February 12, 1929 expressly differentiated between Anderson and his own combination. He states that Anderson does not show a packing having a flange. This is true, for if one examines the drawing, figure 11 of the Anderson patent (Page 438, Transcript) one discovers that Anderson used a "U" packing, as does the alleged infringing device in the litigation now before the court. Anderson, in his specifications, states that "any suitable packing may be used but preferably a cup-shape packing 7". He goes on to delineate a spring for expanding the walls of the packing; and on his exemplification in figure 11 of the drawing, he shows a "U" packing with the spring on the interior thereof. The patentee says in so differentiating:

"Anderson, for instance does not show the unthreaded end of the pipe extending into the rigid sleeve. Furthermore, he does not show *a packing having a flange clamped in the sleeve* and a free portion extending into the sleeve and frictionally engaging the unthreaded end of the pipe. It is obvious that this construction produces a joint in which the packing means is enclosed in the sleeve, and yet, at the same time, a wide amplitude of oscillation is permitted by the free construction of the unthreaded end and of the packing itself, relative to the sleeve.

"Claims 12 and 13 both define these 'novel' features very definitely. Attention is called to the examiner that claims 12 and 13 are generic to the same modification of the invention, for while claim 13 defines a sleeve as being formed with the

groove *frictionally retaining the flange of the packing*, claim 12 defines the sleeve as including means for clamping the flange in the sleeve. A glance at figure 6 will show that the sleeve is formed with the annular groove receiving the packing and, at the same time, it is formed in two parts, so that the packing may be clamped in the groove."

In other words, in the patent office, and to differentiate from Anderson, Lanninger stressed the distinction between his flange packing and Anderson's "U" packing in order to avoid rejection on the reference.

Contrast this distinction made by the patentee, in order to secure the issue of his patent over the Anderson reference, with the testimony of the appellees' witnesses Vale and Hanson in the case at bar. At pages 125 and 140 to 171, inclusive, the witness Vale insists that practically any type of packing is a "flange" packing and certainly his version of a "flange" packing is wide enough to include the packing of Anderson which the patentee Lanninger was so careful to differentiate as being a different instrumentality to his own "flange" packing in order that his patent might issue. And referring to Exhibit 17, the packing wherein is practically identical to the packing disclosed by Anderson (Figure 11 at page 438, Transcript of Record) the witness Hanson insists (Page 357, Transcript of Record) that the packing in Exhibit 17 has a flange and again, on page 366, and referring to the same packing, the same witness insists that the same may be called a "flange" gasket "because it has a flange on it". At best, it must be

said that the construction placed by these two witnesses is 100% at variance with the construction adopted by the patentee when he differentiated his patent from Anderson in order to secure its issue.

And the representatives of the patentee now seek to fasten infringement upon these appellants because of their very use of that same "U" packing upon which the patentee differentiated his alleged invention from Anderson. This they may not do.

A like situation arose in—

Directoplate Corp. v. Donaldson Lithographing Co., 51 F. (2d) 199, 202.

"Koppe was not a pioneer in the field of vacuum-pressure frames for photographic printing. Like all improvers, he was, and is, entitled only to a narrow range of equivalents. He has disclosed no broad, generic invention, unless it be in the use of the vacuum-pressure frame in a photo-composing machine, and this combination is not claimed. He has been specific in matters of number, form, structure, relationship, and function of the elements of his claim (as the condition of the art required him to be), and we do not think that he can now be permitted to depart from the plain meaning of the language he has adopted, or to claim for such language a broad and generic construction. Compare *Lektophone Corp. v. Rola Co.*, 282 U.S. 168, 171, 51 S. Ct. 93, 75 L. Ed. 274. Viewed from another angle, intent and the inventor's own appraisal of the nature of his invention are of great importance. In *D'Arcy Spring Co. v. Marshall Ventilated Mattress Co.*, 259 F. 236, 240, this court said: 'Where the claim defines an element in terms of its form, material, location or function, thereby apparently creating an express

limitation, where that limitation pertains to one inventive step rather than to its mere environment, and where it imports a substantial function which the patentee considered of importance to his invention, the court cannot be permitted to say that other forms, which the inventor thus declared not equivalent to what he claimed as his invention, are nevertheless to be treated as equivalent, even though the court may conclude that his actual invention was of a scope which would have permitted the broader equivalency.' This statement has peculiarly forceful application to the present case. Even though we were to conclude that Koppe might have claimed a broad monopoly in the use of vacuum-pressure frames, of whatever structure, in a photo-composing machine, he has voluntarily limited himself to a specific construction of clearly defined elements all pertaining to the inventive step as he then understood it. Such limitation is not the less effective because voluntary or inserted unnecessarily. *Firestone Tire & Rubber Co. v. Seiberling* (C.C.A. 6), 257 F. 74, 78, 79; *Lakewood Engineering Co. v. Stein* (C.C.A. 6) 8 F. (2d) 713, 715; *Vanderveld v. Rollman & Sons Co.* (C.C.A. 6), 28 F. (2d) 948, 951. That which is not literally within the claim does not infringe."

2. The record discloses (Exhibits 87 and 88 and testimony of McDougall (Pages 237 to 254, Transcript of Record) that in the year 1938 and while the Appellee, California Corrugated Culvert Co., was licensee under the Pierce patent 1945293, the said Appellee made a careful check through its patent attorneys to determine whether or not the patent in suit would be infringed through the manufacture and sale of pipe joints or couplers responding to the claims of the Pierce patent and including an interior locking means. The said appellee determined that such would not be the

case, and thereupon prepared and forwarded to George F. McDougall, Patent Attorney for the said Pierce, a certain proposed form of claim for the new Pierce invention (Exhibit 88-A). No patent issued on this invention which is exemplified by Exhibit 82 and sub-numbers, because, apparently, Pierce's idea was already patented (Page 252, Transcript of Record); but the fact remains that the said appellee here defined its field under the claims of the patent in suit as not including the Pierce coupler with the addition of *interior* locking means. The proposed locking means, which the said appellee itself described in its proposed form of claim was hinged; and as before set out, the change of position of the parts from interior to exterior is of no moment. Bearing this in mind, it may be said that the said appellee here defined the claims of the patent in suit as not extending to the Pierce coupler as equipped with hinged locking means. And this definition on the part of the said appellee, California Corrugated Culvert Co., was communicated by the said McDougall to the appellants herein prior to the notification of infringement, Exhibit 90. Proof was proposed that the appellants herein acted upon such information so received by them (Pages 243, 324 and 326, Transcript); but the trial court finally ruled out all evidence along this line and declined the final proffered proof, holding that in no event would it avail the appellants herein (Pages 324 to 327, inclusive, Transcript of Record).

The patentee's appraisal of the nature of his invention is of great importance.

- A. O. Smith Corporation v. Lincoln Electric Co.,
82 Fed. (2d) 226, 229, C.C.A. 6 (1936).
Wood v. Peerless Motor Car Corp., 75 Fed. (2d)
554, C.C.A. 6 (1935).

The acts and conduct of an owner of a patent may also give a construction to a claim which will avoid infringement. For instance, where the patentee or his assignee had for a number of years placed a certain construction on a claim with knowledge that the defendant during that time had been selling a device for a similar purpose to that of complainant but which did not infringe the claim as so construed, complainant was held to be estopped from claiming infringement.

- Westinghouse Electric & Manufacturing Co. v.
Wagner Co., 129 Fed. 604, C.C. Mo.
McGill v. Whitehead & Hoag Co., 137 Fed. 97
C.C. N.J.

These cases refer to the "patentee" or "assignee", but in this instance it is the exclusive licensee under the patent for the purposes of the use on account of which infringement is here charged who construed the claims of the patent and who must be bound by his construction inasmuch as the use and sale complained of falls within the scope of his license.

3. The trial court's findings are to the effect that the packing element in the accused device performs the same function in the same manner as does the packing element described in claim 3 in the patent in suit.

The range of equivalents to be accorded a patent depends upon and varies with the degree of invention.

Continental Paper Bag Company v. Eastern Paper Bag Company, 210 U.S. 405, 52 L. Ed. 1122 (1908).

The range of equivalents to which an inventor is entitled is broad in an uncrowded art and narrow in a crowded one.

Page 1213, Volume 2 Dellar's Edition Walker on Patents (1937 Edition) and authorities there cited.

A range of equivalents will not be allowed which will give to a claim an enlarged scope expressly denied to it in the patent office.

Page 1214 Dellar's Edition Walker on Patents, Volumes 2 and authorities there cited.

In this instance, Lanninger secured issue of his patent only by differentiating his "flange" packing from the "U" packing disclosed by Anderson. He confined himself to the single form of packing in order that his patent might issue at all. Despite this fact, and despite the plain and unambiguous language of claim 3 prescribing the form of his packing, the court now extends that language to include the very form which Lanninger disclaimed in the patent office in order to secure issue of his patent.

And, in this instance, an additional factor presents itself. The testimony of the witnesses Finkbeiner (Pages 257, 269 and 271 and 275 to 289, Transcript of

Record) and McDougall (Pages 207 to 210, and 221 and 222, Transcript of Record) discloses that the "U" or "V" packing operates by hydraulic pressure at both of its edges, whereas the flange packing operates through the imposition of hydraulic pressure on its thin or free end and by the application of *mechanical* pressure upon the flange. There is a distinct difference in the means of operation between the two types. The Appellee's witness, Baldwin Vale, describes the operation of the flange packing (Page 115, Transcript of Record) when he says "It is *wedged* up in there, and the connection of the wedge is frictional." And he is correct in so doing; and the operation of the wedge is a mechanical operation and not a hydraulic operation. The witness McDougal confirms appellee's witness Vale on this point (Page 222, Transcript of Record). It is true that in other parts of his testimony the witness Vale discloses other ideas of the operation of the flange packing; and the witness, Hanson, decides that the operation of the flange packing and the "U" or "V" packing is identical. There is a conflict; but it can be resolved by reference to the ideas of the patentee Lanninger himself. In five of his six claims he resorts to the mechanical process of clamping the flange. In the sixth claim, that here in suit, he "frictionally retains it". And even the word "frictionally" connotes the application of mechanical as distinguished from a hydraulic pressure.

Where a claim for combination specifies a certain element as entering into it, such element is thereby

made material and the court cannot declare it immaterial.

Fay v. Cordesman, 109 U.S. 408, 420, 27 L. Ed. 979 (1893).

And where a combination of old elements is relied on for patentability there will be no infringement if any one of the material parts of the combination is omitted and the patentee will not be heard to deny the materiality of any element included in his combination claim.

United States Ozone Co. v. U. S. Ozone Co. of America, 62 Fed. (2d) 881, 889, C.C.A. 7 (1932).

Adam v. Folger, 120 Fed. 260, C.C.A. 7.

Vance v. Campbell, 66 U.S. (1 Black) 427, 17 L. Ed. 168.

Union Water Meter Co. v. Desper, 101 U.S. 332, 337, 25 L. Ed. 1024.

McClain v. Ortmyer, 141 U.S. 419, 423, 35 L. Ed. 800.

Texas Rubber & Specialty Corporation v. D. & M. Machine Works, 81 Fed. (2d) 206, 208, C.C.A. 5 (1936).

To sum up: the patentee Lanninger is charged with knowledge of the trade name of his "flange" packing as of the time when he entered the patent office with his application for patent, for that trade name was well established in the American packing industry (See Exhibits 46A to 46F, inclusive, 97, 98, 99, 100, 101, 102, 103 and 104; and the testimony of the witnesses Vale (Pages 146 and 163, Transcript of Record), McDougall (Pages 206 & 207, Transcript of Record) and

Finkbeiner (Pages 256, 267 and 268, Transcript of Record). And in addition to being charged with knowledge of such trade name, he actually had such knowledge and he employed that knowledge to differentiate between his combination, employing the "flange" packing and the combination of Anderson which employed the "U" packing.

In *Smith v. Magic City Kennel Club*, 282 U.S. 784, 75 L. Ed. 707, the court said:

"Where a patentee has narrowed his claim in order to escape rejection he may not 'by resort to the doctrine of equivalents' give to the claim the larger scope which it might have had without the amendments, which amount to disclaimer".

And a patentee cannot claim as equivalent something which he relinquished to secure his patent, despite the fact that the invention is a meritorious one.

John I. Paulding, Inc. v. Leviton, 45 Fed. (2d) 125, C.C.A. 2 (1930).

These cases refer to claim modifications, though the same principles are here applicable; but in *Good-year Dental Vulcanite Co. v. Davis*, 102 U.S. 222, the Supreme Court said:

"This construction of the patent is confirmed by the avowed understanding of the patentee, expressed by him, or on his behalf, when his application for the original patent was pending. We do not mean to be understood as asserting that any correspondence between the applicant for a patent and the Commissioner of Patents can be allowed to enlarge, diminish or vary the language of a pat-

ent afterwards issued. Undoubtedly, a patent, like any other written instrument, is to be interpreted by its own terms. But when a patent bears on its face a particular construction, inasmuch as the specification and claim are in the words of the patentee, it is reasonable to hold that such a construction may be confirmed by what the patentee said when he was making his application. The understanding of a party to a contract has always been regarded as of some importance in its interpretation."

In *Quick Action Ignition Co. v. Maytag*, 39 F. (2d) 595, (C.C.A. 8) the court said:

"The above proceedings in the Patent Office convince that this patent was allowed and accepted only upon the conclusion that an essential element of novelty in the combination was the overhanging armature core * * * To a combination with that element so limited the patentee is therefore bound."

See also

Automatic Appliance Co. v. McNiece Motor Co.,
20 Fed. (2d) 578 (C.C.A. 8).

Aleograph Co. v. Electrical Research Products,
55 F. (2d) 106 (C.C.A. 5).

General Chemical Co. v. Aluminum Co. of America, 11 F. (2d) 810 (D.C., W.D. Pa.) Affirmed C.C.A. 3, 11 F. (2d) 813.

Ladd v. Walker, 7 F. (2d) 72 (C.C.A. 3).

Freeman Electric Co. v. Weber Electric Co., 262 Fed. 769 (C.C.A. 3) from which is quoted:

"But, even assuming that the words 'when telescopically applied' are susceptible of a construction sufficiently broad to include the bayonet joint locking movement, the remarks, filed in the Patent Office by the patentee or on his behalf, dis-

tinguishing the Weber locking movement from that of Kenney, disclose that either Weber always intended and understood that these words should bear their usual meaning, and thus exclude the Kenney movement, or under stress of the Patent Office rejection he elected to so restrict their meaning. In either event the result is the same, namely, that having thus limited his claims to exclude the bayonet joint movement of Kenney, he is not now entitled, through the aid of the doctrine of equivalents or otherwise, to a construction that would embrace it."

Gottschalk Manufacturing Company v. Springfield Wire & Tinsel Company, 74 F. (2d) 583 (C.C.A. 1) from which is quoted:

"A patentee will not be permitted to repudiate a construction which he has placed upon a claim in a communication with the Patent Office in order to obtain the allowance of it."

In,—

Lunati v. Barrett, 104 F. (2d) 313, 316 (6th Cir.),

the court said:

"The appellant argues that even though we consider this a limitation there is no estoppel by reason of the amendment because other limitations were therein incorporated, including narrow spaced parallel rails, arranged on opposite sides of the supporting member, and secured at their ends near the centers of the rails, the latter being relatively long and free from extraneous elements from their ends to the extensions of the supporting members. We are, however, dealing with a combination, the elements of which were old, precisely limited to avoid prior art. If the defendant does not have this combination he does not infringe.

“The claims in suit must be narrowly construed within the principles so often applied in this court that where claims define an element in terms of form, location or function, thereby creating an express limitation, where that limitation pertains to the inventive step and imports a substantial function which the patentee considered of importance, the court cannot be permitted to say that other forms which the inventor thus declared not equivalent are so to be treated. *D’Arcy Spring Co. v. Marshall Ventilated Mattress Co.*, 6 Cir., 259 F. 263, 240; *Hollingshead Company v. Bas-sick Mfg. Co.*, 6 Cir., 73 F. (2d) 543, 548; *Directo-plate Corp. v. Donaldson Lithographing Co.*, 6 Cir., 51 F. (2d) 199, and our recent decision in *Val-jean v. Perfection Stove Co.*, 6 Cir., 103 F. (2d) 60. Whether our conclusion be based upon estop-pel in patent office proceedings or upon a limita-tion voluntarily inserted in the claims to avoid prior art seems to us unimportant. The result in claim construction is the same.”

4. Section 4888 of the Revised Statutes requires the inventor to disclose his invention in plain language; and it is obvious that the purpose of the statute is two-fold: first, to set aside to the inventor as his own that which he has actually invented; and, secondly, to advise the public at large not only of the extent of the inventor’s domain in which it may not trespass, but also the extent of that field which remains open to the general use.

See *General Electric Co. v. Wabash Clients Corp., et al.*, 304 U.S. 364, Page 369.

“The limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others and the assurance that the subject of a patent will be dedicated ul-

timately to the public. The statute seeks to guard against unreasonable advantages to the patentee and disadvantages to others arising from uncertainty as to their rights. The inventor must 'inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not.' The claims 'measure the invention'."

In the instant case, as developed in the prior discussion, the patentee Lanninger did define his field of domain. That field he circumscribed to the use as one element of his combination of a "flange" packing. And a "flange" packing was a definitely known quantity. The trial court, to arrive at the interlocutory decree herein, as rendered, was obliged to disregard the plain claim language of Lanninger which, in the course of his long course through the patent office, the patentee had particularly defined and differentiated, and to determine that the patentee did not mean what he said when he so proudly described his "flange" packing but that, in fact, apparently, patentee was claiming practically any packing at all as one of the elements of his combination.

In *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 419, 52 L. Ed. 1122, the Supreme Court says:

"The claims measure the invention"

and

"The claim actually made by the patentee is the measure of his right to relief." *Peterson v.*

General Seafood Corporation, 66 Fed. (2d) 459, 463. C.C.A. 1 (1933).

And in *Cimiotti Unhairing Co. vs. American Fur Refining Co.*, 198 U.S. 399, 49 L. Ed. 1100, the Supreme Court speaks thus :

“In making his claim, the inventor is at liberty to choose his own form of expression; and while the courts may construe the same in view of the specifications and the state of the art, they may not add to or detract from the claim. And it is equally true that as the inventor is required to enumerate the elements of his claim, no one is an infringer of a combination claim unless he uses all the elements thereof.”

It is obvious that the trial court was forced to ignore claim language in arriving at the decree entered and, in so doing, was guilty of error.

The distinction between the “U” or “V” packing employed as an element of the accused devices herein and the “flange” packing of Lanninger has been previously discussed and will not be here repeated.

CONCLUSION

It becomes obvious that the trial court erred in declining to consider in anticipation of the patent in suit prior patents for hose couplings; and on this account alone and if claim 3^d of the patent in suit could indeed be held valid at all, it is necessary that the decree appealed from be reversed and the cause remanded in order that prior patents involving hose

connections may be introduced in anticipation of the patent in suit.

But more than this, it is also obvious that in assembling the combination claimed as patented in claim 3 of the patent in suit the patentee did nothing but assemble known elements, all similarly employed in the prior art, into an aggregation involving little or nothing of skill, and certainly nothing of invention; but even when so assembled and claimed the end product was not useful and, so, was unpatentable on both counts, and the claim is void.

Further, the appellee, California Corrugated Culvert Co., had in the past, and after careful examination of all of the factors involved, by its patent counsel, defined instrumentalities of the exact manufacture of the accused devices excepting only that these instrumentalities included interior rather than exterior locking means as being without the disclosures in the field of protection of claim 3 of the patent in suit, and that fact had been made known to the appellees herein and they had acted in the light thereof and, so, the appellants herein are now estopped to assert infringement.

Further, the patentee Lanninger in the course of his application in the patent office defined and delimited the scope of his claim 3 to include a flange packing, and differentiated that flange packing from a "U" packing in order to secure the allowance of his patent; and he and his successors in interest are now estopped

to assert claim 3 of the patent in suit in scope sufficient to include that which the patentee in the patent office disavowed as a part of his combination; namely, the inclusion as one element of the claim of the "U" packing.

Further, the trial court erred in ignoring the plain and unambiguous language of claim 3 of the patent in suit, defined as that language had previously been, as disclosed by the file wrapper, to exclude a "U" packing, and by substituting for the express language of the claim of the patent in suit a judicial determination amounting actually to a judicial reissue of the patent by reading the language of the patent in suit to include, in substance, any type of packing, either hydraulically or mechanically activated.

Respectfully submitted,

J. S. MIDDLETON,

Attorney for Appellants.

Service of the within Brief and receipt of three copies thereof are acknowledged at Portland, Oregon, this day of July, 1943.

.....
Of Attorneys for Appellee, California Corrugated Culvert Co.

Service of the within Brief and receipt of three copies thereof are acknowledged at Portland, Oregon, this day of July, 1943.

.....
Of Attorneys for Appellee, Leo T. Crowley, as Alien Property Custodian of the United States.

No. 10,334

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 3

SAM SCHNITZER, HARRY J. WOLF, ROSE
SCHNITZER and JENNIE WOLF; indi-
vidually, and as a co-partnership, do-
ing business under the name and
style of Alaska Junk Co.,

Appellants,

vs.

CALIFORNIA CORRUGATED CULVERT CO.
(a corporation), and LEO T. CROW-
LEY, Alien Property Custodian of the
United States,

Appellees.

Upon Appeal from the District Court of the United States
for the District of Oregon.

BRIEF FOR APPELLEES.

FILED

AUG 11 1943

PAUL P. O'BRIEN,
CLERK

GEISLER AND GEISLER,

THEO. J. GEISLER,

L. R. GEISLER,

Platt Building, Portland, Oregon,

WM. S. GRAHAM,

Crocker Building, San Francisco, California,

*Attorneys for Appellee,
California Corrugated Culvert Co.*

Subject Index

	Page
Jurisdiction of the District Court.....	1
Further Statement of the Case.....	2
Specification II—The invention described in Lanninger patent	4
The quality of invention.....	7
The disclosure and claim in suit.....	9
The claim in suit.....	10
Claim 3 is a valid combination.....	11
Lanninger's new use of flexible joints.....	13
Cooperation of elements of the combination.....	14
Presumption of validity of patent.....	19
Presumption of validity is even stronger where patent is granted over art cited by a defendant.....	20
Simplicity does not negative invention.....	22
Commercial success	29
Plaintiffs' commercial device of Exhibit 17 is made according to the Lanninger disclosure.....	31
Prior art neither negatives validity nor narrows Claim 3... ..	34
Separate elements gathered from many sources do not anticipate	42
Anticipating patents must clearly disclose the same inventive idea	43
Accidental results and embryonic ideas do not anticipate... ..	44
Specification I—Flexible hose couplings are non-analogous art	46
Lanninger patent entitled to liberal construction.....	49
Specification III—File wrapper of Lanninger patent.....	51
Defendant's contention of estoppel by Exhibits 87 and 88..	55
Infringement	57
Claim language not ignored by trial court.....	64
Defendants' claim that their devices are made under Pierce Patent No. 1,945,293	65
Conclusion	66

Table of Authorities Cited

Cases	Pages
Aiken v. National Tube Co. (C. C. A. 6), 163 Fed. 254....	47n
A. B. Dick Co. v. Underwood Typewriter Co., 246 Fed. 309 (S. D. N. Y. 1917).....	43
Bake-Rite Mfg. Co. v. Tomlinson (C. C. A. 9), 16 Fed. (2d) 556	56, 66
Bennett, In re (C. C. P. A. 1933), 65 Fed. (2d) 144.....	48
Berry v. Robertson, 40 Fed. (2d) 915.....	31
Butler v. Burch Plow Co., 23 Fed. (2d) 15 (C. C. A. 9)....	64
Cadillac Motor Car Co. v. Austin, 225 Fed. 983 (C. C. A. 6)	43
Canda v. Michigan Malleable Iron Co. (C. C. A. 6), 124 Fed. 486	44
Cantrell v. Wallick, 117 U. S. 689, 29 L. Ed. 1017.....	12, 19
Cincinnati Rubber Mfg. Co. v. Stowe Woodward, Inc. (C. C. A. 6, 1940), 111 Fed. (2d) 239.....	49
Collar Button Case (Krementz v. Cottle, 1893), 148 U. S. 556, 37 L. Ed. 558.....	26
Consolidated v. Window Glass (C. C. A. 3), 261 Fed. 373..	24
Consolidated Safety Valve Co. v. Crosby etc. Valve Co., 113 U. S. 157, 28 L. Ed. 939.....	41, 64
Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 55 L. Ed. 527.....	25, 61
Dow Chemical Co. v. Williams Bros. Well Treating Co. (C. C. A. 10), 81 Fed. (2d) 495, 28 Pat. Qr. 243.....	13, 22
Eibel Process Co. v. Minnesota & Ontario Paper Co., 261 U. S. 45, 67 L. Ed. 523.....	23, 26, 27, 30, 44, 50, 58
Electric Candy Machine Co. v. Morris, 156 Fed. 972.....	44
Expanded Metal Co. v. Bradford, 214 U. S. 366, 53 L. Ed. 1034	25
Farmers Handy Wagon Co. v. Beaver Silo & Box Mfg. Co. (C. C. A. 7), 236 Fed. 731.....	61
G. H. Packard Mfg. Co. v. St. Louis Janitor Supply Co. (C. C. A. 8, 1940), 115 Fed. (2d) 958.....	54
Gairing Tool Co. v. Eclipse Interchangeable Counterbore Co., 48 Fed. (2d) 73 (C. C. A. 6).....	21

TABLE OF AUTHORITIES CITED

iii

	Pages
General Co. v. Bullock (C. C. A. 6), 152 Fed. 427.....	47n
General Electric Co. v. Save Sales Company (C. C. A. 6), 82 Fed. (2d) 100, 29 Pat. Qr. 59.....	21
Gordon Form Lathe Co. v. Walcott Machine Co., 32 Fed. (2d) 55 (C. C. A. 6).....	21
Graham Paper Co. v. International Paper Co., International Paper Co. v. Graham Paper Co., 46 Fed. (2d) 881.....	31
H. D. Smith & Co. v. Peck Stow and Wilcox Co. (C. C. A. 2), 262 Fed. 415.....	44
H. J. Heinz v. Cohn (C. C. A. 9), 207 Fed. 547.....	18
H. K. Regar & Sons, Inc. v. Scott & Williams, Inc., 63 Fed. (2d) 229 (C. C. A. 2).....	14
Herman v. Youngstown (C. C. A. 6), 191 Fed. 579.....	47n
J. A. Mohr & Sons v. Alliance Securities Co. (C. C. A. 9), 14 Fed. (2d) 799.....	21, 43
J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259 (C. C. A. 8).....	10, 43
Kawneer Co. v. McHugh, et al. (C. C. A. 9), 51 Fed. (2d) 560	20
Keystone Mfg. Co. v. Adams, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103.....	51
Kitchen v. Levison (C. C. A. 9), 188 Fed. 658.....	24
Klein v. Russell, 19 Wall. 433, 86 U. S. 117, 22 L. Ed. 117..	50
Lakeside Cheese Co. v. Shefford Cheese Co. (C. C. A. 7), 72 Fed. (2d) 497, 23 Pat. Qr. 184.....	22
Lakewood Engineering Co. v. Walker (C. C. A. 6, 1928), 23 Fed. (2d) 623.....	47n
Los Alamitos Sugar Co. v. Carroll (C. C. A. 9), 173 Fed. 280	44
Lyonan v. Bassick (C. C. A. 6), 18 Fed. (2d) 29.....	47n
Miehle v. Whitlock (C. C. A. 2), 223 Fed. 647.....	24
Morley Sewing Machine Case of 1888, 129 U. S. 263, 32 L. Ed. 715	26
National Cash Register Co. v. American Cash Register Co. (C. C. A. 3), 53 Fed. 371.....	17

	Pages
Owen v. Perkins Oil Well Cementing Co. (C. C. A. 9), 38 Fed. (2d) 30	31
Parker v. Automatic Machine Co., 227 Fed. 449 (No. Dist. Calif.)	64
Parks v. Booth, 12 Otto 96, 102 U. S. 96, 26 L. Ed. 54....	42
Payne Furnace and Supply Co. v. Williams-Wallace Co. (C. C. A. 9, 1941), 117 Fed. (2d) 823.....	18, 20, 43, 54
Pittsburgh Reduction Co. v. Cowles, 55 Fed. 301.....	44
Potts v. Creager, 155 U. S. 597, 39 L. Ed. 275.....	25, 46, 47
Providence Rubber Co. v. Goodyear, 76 U. S. 788, 19 L. Ed. 566	51
Pyrene Mfg. Co. v. Boyce (C. C. A. 3, 1923), 292 Fed. 480 (cert. den. 263 U. S. 723).....	7
Reinharts, Inc. v. Caterpillar Tractor (C. C. A. 9), 85 Fed. (2d) 628	20, 51, 54, 59, 64
Research Products Co. v. Tretolite Co. (C. C. A. 9, 1939), 106 Fed. (2d) 530	31
Richmond Screw Anchor Co. v. United States (1928), 275 U. S. 331, 72 L. Ed. 303.....	9
Sachs v. Hartford Electric Supply Co. (C. C. A. 2d), 47 Fed. (2d) 743, 8 Pat. Qr. 302.....	18
San Francisco Bridge Co. v. Keating (C. C. A. 9), 68 Fed. 351	17
San Francisco Cornice Co. v. Beyrle (C. C. A. 9), 195 Fed. 516	20
Sanitary Refrigerator Co. v. Winters (1929), 280 U. S. 30, 74 L. Ed. 147, 3 Pat. Q. 40.....	33, 63, 66
Schumacher v. Buttonlath Mfg. Co. (C. C. A. 9), 292 Fed. 522	19
Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33 (78 U. S.) .	19, 43
Sherman, Clay & Co. v. Searchlight Horn Co., 214 Fed. 86 (C. C. A. 9)	31
Simplex Window Co. v. Hauser R. W. Co., 248 Fed. 919 (C. C. A. 9).....	56, 66
Skelly Oil Co. v. Universal Oil Products Co., 31 Fed. (2d) 427 (C. C. A. 3rd).....	43
Samuel B. Smith v. E. H. Snow, et al., 294 U. S. 1, 79 L. Ed. 721.....	10, 26, 50, 54

TABLE OF AUTHORITIES CITED

v

	Pages
Smokador Mfg. Co. v. Tubular Products Co. (C. C. A. 2), 31 Fed. (2d) 255.....	21
Snow v. Keller-Thomason (C. C. A. 9), 241 Fed. 119.....	25
Stebler v. Riverside Heights Orange Growers (C. C. A. 9), 205 Fed. 735.....	43
Super Mold Corp. v. Bacon (C. C. A. 9, 1942), 130 Fed. (2d) 860	49
Temco Elec. Motor Co. v. Apco Mfg. Co. (1928), 275 U. S. 319, 72 L. Ed. 298.....	31, 37, 56, 66
The Barbed Wire Patent Case (1892), 143 U. S. 275, 36 L. Ed. 154	26
Tilghman v. Proctor, 12 Otto 708, 102 U. S., 26 L. Ed. 279	10, 44
Topliff v. Topliff, 145 U. S. 156, 36 L. Ed. 659.....	44, 50
Trabon Engineering Corp. v. Dirkes (C. C. A. 6, 1943), Advance Sheets U. S. Pat. Quar. of July 17, 1943, Vol. 58, page 97).....	45
United States v. Dubilier Condenser Corp., 289 U. S. 178, 77 L. Ed. 1114 (1933).....	8
United Verde Co. v. Pierce-Smith Converter Co. (C. C. A. 3), 7 Fed. (2d) 13.....	44
Vacuum Cleaner Co. v. American Rotary Valve Co., 227 Fed. 998	31
Vrooman v. Penhollow, 179 Fed. 296 (C. C. A. 6th).....	10
W. N. Matthews Corp. v. Alliance Securities (C. C. A. 8, 1930), 40 Fed. (2d) 879.....	48
Washburn v. Barbed Wire Co., 143 U. S. 275, 36 L. Ed. 154, 12 Sup. Ct. 443.....	25
Waxham v. Smith, 294 U. S. 20, 79 L. Ed. 733.....	26, 50
Webster Loom Co. v. Higgins, et al., 105 U. S. 580, 26 L. Ed. 1177.....	25, 29
Wellman, et al. v. Cramp, 3 Fed. (2d) 531 (C. C. A. 6th)	43
Western Electric Co. v. La Rue, 139 U. S. 601, 35 L. Ed. 294	10, 47n
Western Electric Co. Inc. v. Wallerstein (C. C. A. 2), 60 Fed. (2d) 723, 15 Pat. Qr. 9.....	22
Wickelmann v. Dick (C. C. A. 2), 88 Fed. 264.....	44

	Pages
Willard v. Union Tool Co. (C. C. A. 9th), 253 Fed. 48....	12
Winans v. Denmead (1853) (15 How. 341, 14 L. Ed. 721)	26, 62, 63

Codes

Judicial Code, Sec. 48 (28 U. S. C. A. Sec. 109).....	2
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Texts

Knight's Mechanical Dictionary, page 876.....	31, 33
---	--------

No. 10,334

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SAM SCHNITZER, HARRY J. WOLF, ROSE SCHNITZER and JENNIE WOLF; individually, and as a co-partnership, doing business under the name and style of Alaska Junk Co.,

Appellants,

vs.

CALIFORNIA CORRUGATED CULVERT CO. (a corporation), and LEO T. CROWLEY, Alien Property Custodian of the United States,

Appellees.

Upon Appeal from the District Court of the United States
for the District of Oregon.

BRIEF FOR APPELLEES.

JURISDICTION OF THE DISTRICT COURT.

On the question of jurisdiction, just one additional fact may be mentioned specifically. All of the defendants are inhabitants within the jurisdiction of the trial Court and have an established place of business in such district and are charged by the complaint to

Italics supplied unless otherwise stated.

have committed acts of infringement in said district, which facts, save and except the charge of infringement, are admitted by the answer (Par. II and III, T. R. 8). Jurisdiction of the District Court is, therefore, further predicated on Sec. 48, *Judicial Code* (28 U. S. C. A. Sec. 109).

FURTHER STATEMENT OF THE CASE.

While portions of appellants' statement of the case depart from a statement of facts to indulge in argument, it does give generally correct statements of the parties, the substitution of the Alien Property Custodian for original plaintiff and patentee Karl Lanninger, and the issues involved of validity and infringement of claim 3 of Letters Patent No. 1,747,942, granted February 18, 1930, to Lanninger. Legal title in plaintiffs is admitted, as well as license to, and corporate status of plaintiff California Corrugated Culvert Co. (T. R. 8 and 34). The statement of the case by appellants is controverted in the assertion on page 8 that " 'frictionally retaining the flange in the groove of the sleeve' is the root from which the claim of infringement grows", whereas claim 3 is a combination claim, and the basis for the claimed infringement is the practice of the invention of that combination. The statement of appellants' brief (page 9) is controverted, to the effect that defendants alleged infringing structures are made responsive to Pierce patent No. 1,945,293, granted January 30, 1934 (Exhibit 22, T. R. 387-390), since that patent does not

have a word of disclosure that the Pierce patent is for a flexible joint, whereas the alleged infringing structures 3 and 48, and 8 and 47 are flexible joints.

The invention of the Lanninger patent involved in this action is a flexible joint in connection with pipes, whereby a string of unthreaded pipe sections may be connected and disconnected without use of bolts, nuts or use of tools and yet maintains a tight leak-proof flexible joint between the pipe sections so that a portable pipe system may be installed over irregular ground and laid around angles or obstructions. While the patentee did not limit the patent to any particular use, having stated that the joint was in "a line of conduits especially designated for conducting water or steam", the evidence in this case centered around the specific use of the invention for "showering and irrigating" purposes, for which the plaintiff California Corrugated Culvert Co. has an exclusive license (Exhibit 13). As shown by the evidence (T. R. 353-356), it was unknown prior to Lanninger's patent (1930) to provide a flexible connectible and disconnectible joint in a line of unthreaded pipe, even regardless of his much earlier application date of October 8, 1923. He was a pioneer in a new conception of making possible the irrigation of unlevelled ground by a portable irrigation system of rigid pipe which could be moved from place to place in a field or transported from field to field, or removed from a field for plowing or cultivation. It permitted irrigation without leveling the land and thus denuding the top soil in the high places only to scrape it into the low places in a leveling process. It thereby brought into practical produc-

tivity vast areas which had not theretofore been irrigable, firstly because of uneven topography or secondly because the laying of separate strings of permanently installed pipe in parallel rows every fifty feet (T. R. 353), would make the cost prohibitive. The defendants have manufactured and sold the devices of Exhibit 48 (also the similar Exhibit 3) and Exhibit 47 (also the similar Exhibit 8), with additional pipe length installed at the respective ends thereof (T. R. 32), for irrigation purposes (T. R. 38).

The foregoing are the principal facts and it is believed other facts discussed are collateral thereto.

**SPECIFICATION II—THE INVENTION DESCRIBED IN
LANNINGER PATENT.**

In carrying out the purposes of the invention, the patentee described his invention (Exhibit 11, T. R. 383-386) as a

“line of conduits especially designed for conducting water or steam”, and “consists of pipes which are held together by means of sleeve-like coupling casings with rubber packing cups” (page 1, lines 1 to 8).

“On account of the rigidity of the coupling casing it is, however, very difficult(y) to insure the l(t)ightness of the joint between the coupling and the casing. According to the invention this difficulty is overcome by using the elastic packings through which not only is a tight joint capable of being maintained, but a certain degree of flexibility is imparted to the pipe line” (page 1, lines 19-27).

It will be noted that flexibility is provided by the elastic packing member.

“The very strong vertical flange on the packing cup permits of a specially *simple fixation* as it is inserted and clamped in a groove of the coupling sleeve.” (page 1, lines 23 to 30.)

But the patentee does not limit the invention to a mechanically operated clamp to form the groove and engage the flange of the packing member, since he provides elsewhere that the “flange of the packing is held in a recess” (page 1, line 60), and in Figs. 1, 3 and 4 he distinctly shows the flange b^2 of the packing “held in a recess e ” without other mechanically operated clamp.

One end of the sleeve has a length of pipe attached thereto to form a unit in the “line of conduits”.

“*The other neck of the coupling sleeve is also cylindrical but smooth so that the end of the other pipe can be inserted through this neck and through the hat-shaped rubber packing. The flange of the packing is held in a recess e .*” (page 1, lines 56-61.)

There is then provided a tight fit of the rubber cup on the inserted pipe wall, though none of the parties to this action have employed grooves in the free cylindrical part of the packing, nor is claim 3 limited in that respect.

“In order to facilitate the *tight fitting* of the rubber cup on the pipe wall, grooves are arranged in the cylindrical part of the same.” (page 1, lines 61-64.)

The sleeve of one pipe is then connectible with the inserted pipe by a hingedly securing means. This is a means for relatively securing the sleeve and inserted pipe end, while cooperating to maintain the flexibility heretofore described as provided by the elastic packing, and thus provide for a continuous flexible pipe line over irregular ground. The patentee says:

*“The sleeve is connected with this second pipe by means of a hinge. * * * The easy movement of the hinge and the ample play of the cotterpin in the borings of the hinge further increase the flexibility of the joint of the pipes and the facility of this joint to adapt itself to the irregularities of the ground and the available space.”* (page 1, lines 64-75.)

The patent provides, as an alternative or optional form only, that the flange of the packing *could* be “clamped” adjustably in the groove of the sleeve. In all figures of the drawings the packing flange is shown as frictionally held in the sleeve groove, except in one section of Fig. 3, where it is shown adjustably mechanically clamped. At page 1 the patent states:

“The packing could be adjustably mounted in the casing as shown in Fig. 3. In this case, the sleeve and neck are composed of two parts between the adjacent threaded ends of which the flange of the cup-shaped packing is clamped.” (page 1, lines 85-90.)

That the patentee was referring to inserting unthreaded pipe ends into the sleeve and packing member is demonstrated by the illustration of all the draw-

ings and the use of the term "the rough pipe ends" in describing Fig. 4. (page 1, lines 91-96.)

THE QUALITY OF INVENTION.

Every validly patented invention must involve a new inventive concept. The structural elements employed to concretely demonstrate the usefulness of the new concept are merely an idea of means, but they are not the invention. The structural elements may be highly involved or extremely simple, but if a new, useful and meritorious inventive concept is present, that is the true invention. Mere mechanical skill may often provide a change of structure, but can never be credited with producing a novel mental concept.

And so, the Circuit Court of Appeals, Third Circuit, in sustaining the Boyce motometer patent which merely placed a thermometer in a radiator cap of an automobile and provided an exterior sight-support for it, said the device was mechanically very simple, but it embraced a new concept.

Pyrene Mfg. Co. v. Boyce (C. C. A. 3, 1923), 292 Fed. 480, 481 (cert. den. 263 U. S. 723):

"Invention is a concept; a thing evolved from the mind. It is not a revelation of something which exists and was unknown, but is the creation of something which did not exist before, possessing the elements of novelty and utility in kind and measure different from and greater than what the art might expect from its skilled workers."

Ten years later the Supreme Court employed the same reasoning in defining invention. It said in *United States v. Dubilier Condenser Corp.*, 289 U. S. 178, 77 L. Ed. 1114, 1119 (1933) :

“It (invention) is the result of an inventive act, the birth of an idea, and its reduction to practice; the product of original thought; a concept demonstrated to be true by practical application or embodiment in tangible form. (Citing cases.)”

“Though the mental concept is embodied or realized in a mechanism or a physical or chemical aggregate, the embodiment is not the invention and is not the subject of a patent.”

The new inventive idea or concept of the Lanninger invention is that a *portable* flexible pipe line of rigid pipe could be provided, instantly adaptable for varying “irregularities of the ground” as moved from place to place or field to field, wherein readily releasable connectible and disconnectible joints will be sealed against leakage when subjected to the hydraulic pressures necessary for conveying water under pressure. It is particularly advantageous in showering, overhead or sprinkler irrigation, by putting sprinkler devices in the lengths of pipe. Some appreciation of the merit of Lanninger’s invention may be gained from a very plain mathematical calculation based on the testimony of Hanson (T. R. 353-356). Prior to the Lanninger invention overhead irrigation was practiced by permanently installed rigidly jointed pipes, requiring a row of pipes permanently jointed and permanently installed in rows about 40 feet apart.

The advance in that art may be visualized by considering what this meant in a single forty-acre field. Roughly, forty acres is 1350 feet by 1350 feet. That means about 34 rows of pipe, each 1350 feet long or 45,950 lineal feet of pipe. If Lanninger could do this with one row of portable pipe he would employ only one string of pipe 1350 feet long or only 3% of the required length of pipe, not to mention the additional fact that permanently installed pipe prevents ploughing and cultivating. On this feature alone the Lanninger invention demonstrates the quality of invention far greater than the Supreme Court found to be present in sustaining a combination of old elements in *Richmond Screw Anchor Co. v. United States* (1928), 275 U. S. 331, 72 L. Ed. 303:

“The record showed that a beam adaptable for the purpose weighed 3300 pounds. * * * Such modifications and their advantage were all very clear after the fact; but the old beams had been in use for a number of years and a heavy weight of metal had been used when, by Lenke’s device, it was cut down two-thirds.”

THE DISCLOSURE AND CLAIM IN SUIT.

The structure described in the patent is only one way to give a physical form to the new idea or concept as a demonstration of its utility. Having stated one physical form in which the idea or concept may be carried out advantageously, the patentee is entitled to claim his inventive concept broadly in all the physical forms in which it may be embodied. This principle

of patent law has been repeatedly reiterated, as instanced recently by the Supreme Court in 1935, in *Samuel B. Smith v. E. H. Snow, et al.*, 294 U. S. 1, 20, 79 L. Ed. 721, 732:

“We may take it that, as the statute requires, the specifications just detailed show a way of using the inventor’s method, and that he conceived that particular way described was the best one. But he is not confined to that particular mode of use since the claims of the patent, not its specifications, measure the invention. Paper Bag Patent Case (*Continental Paper Bag Co. v. Eastern Paper Bag Co.*), 210 U. S. 405, 419, 52 L. Ed. 1122, 1128, 28 S. Ct. 748; *McCarty v. Lehigh Valley R. Co.*, 160 U. S. 110, 116, 40 L. Ed. 358, 361, 16 S. Ct. 240; *Winans v. Denmead*, 15 How. 330, 343, 14 L. Ed. 717, 722.”

also:

Western Electric Co. v. La Rue, 139 U. S. 601, 35 L. Ed. 294;

Tilghman v. Proctor, 12 Otto 708, 102 U. S., 26 L. Ed. 279 at 287;

J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259 (C. C. A. 8th);

Vrooman v. Penhollow, 179 Fed. 296 (C. C. A. 6th).

THE CLAIM IN SUIT.

The complaint alleges infringement of claim 3 of the patent, and that claim only is relied upon by plaintiffs (T. R. 6 and 31). Broken into its elements, it comprises:

A pipe joint in connection with pipes, one of which has an unthreaded end,

a rigid coupling sleeve for coupling said pipes into which said unthreaded end extends, said sleeve having an interior annular groove in the inner surface,

a packing of elastic material in said coupling sleeve consisting of a free cylindrical part frictionally enclosing the unthreaded pipe end and having a flange frictionally retained in the groove of said sleeve,

and means for hingedly securing said sleeve on the pipe having the unthreaded end.

CLAIM 3 IS A VALID COMBINATION.

Claim 3 is a combination claim, and, as in every combination the individual elements may be wholly old, or wholly new, or partly old and partly new. This fact does not, however, detract from the merit of the inventive concept. Plaintiffs claim that the result itself is new; that never prior to Lanninger's invention, as shown by his application date in 1923, was it disclosed how a conduit line of rigid, unthreaded pipe lengths could be made to accommodate itself to irregularities of the ground in relatively secured relation while maintaining flexibility and ease of repeated connection and disconnection and a liquid-tight joint at couplings. But the result need not necessarily be even new, if an old result is accomplished in a more facile and efficient way by some joint operation performed by the elements producing a result due to their

cooperative action, an end result to which all the elements contribute.

Cantrell v. Wallick, 117 U. S. 689, 29 L. Ed. 1017:

“The first defense is based on the theory that a patent cannot be valid unless it is new in all its elements as well as in the combination, if it is for a combination. But this theory cannot be maintained.”

The requirements of a combination have been clearly stated by this Court in *Willard v. Union Tool Co.* (C. C. A. 9th), 253 Fed. 48:

“Nor is it necessary that the action of the elements be simultaneous. *Pelton Water Wheel Co. v. Doble*, 190 Fed. 760 (C.C.A. 9); *Burdette-Rowntree Mfg. Co. v. Standard Plunger E. Co.*, 196 Fed. 43; *Novelty Glass Mfg. Co. v. Brookfield* (C.C.A.), 170 Fed. 946; *Krell Auto Grand Piano Co. v. Story & Clark Co.* (C.C.A.), 207 Fed. 946. Nor is it necessary that one of the constituent elements shall so enter into the combination as to change the action of the others. *International Mausoleum Co. v. Sievert* (C.C.A.), 213 Fed. 225. *It is sufficient if there be some joint operation performed by the elements producing a result due to their cooperative action.* *National Cash Register Co. v. American Cash Register Co.* (C.C.A.), 53 Fed. 367; *Toledo Computing Scale Co. v. Moneyweight Scale Co.* (C. C. A.), 178 Fed. 557; *New York Scaffolding Co. v. Whitney* (C.C.A.), 224 Fed. 452; *Ohmer Fare Register Co. v. Ohmer* (C.C.A.), 238 Fed. 182. And the result itself need not be new. It is sufficient if an old result be produced in a more ‘facile, economical, or efficient way’. *New York Scaffolding Co. v.*

Whitney, *supra*; Pelton Water Wheel Co. v. Doble, *supra*.”

Dow Chemical Co. v. Williams Bros. Well Treating Co. (C.C.A. 10), 81 Fed. (2d) 495, 28 Pat. Qr. 243:

“It is contended that the patent consists of an aggregation of old ideas, and not a combination involving invention. This court has so recently explored this question it is unnecessary to till that ground again. Independent Oil Well Cementing Co. v. Halliburton (C.C.A. 10), 54 F. (2d) 896. See, also, Judge Booth’s excellent analysis in *Gray v. Texas Co.* (C.C.A. 8), 75 F. (2d) 606. We there held that a new combination of old elements was patentable, if the *conception involved invention*, and if a new result was produced, or an old result attained in a more facile, economical, and efficient way. In so holding, we but followed *Leeds v. Victor Talking Machine Co.*, 213 U.S. 301, where the Supreme Court held *l.c.* 318, that ‘A combination is a union of elements, which may be partly old and partly new, or wholly old or wholly new.’ We also held that a patentable combination of elements exists if by their reciprocal influence or joint and cooperate action on a common objective, a new result, or an old result in a more efficient way, is effected; such joint action need not be simultaneous nor constant.”

LANNINGER’S NEW USE OF FLEXIBLE JOINTS.

The prior art in the present case does not present a situation where such prior art patents may be considered anticipatory of the combination on the ground

that they are entitled to all uses to which they are capable of being put; no patent in the prior art disclosed the concept of Lanninger nor the means for carrying such a concept into effect. If it be admitted that the separate elements of claim 3 were old, yet the releasably secured flexibility of those elements disclosed a new combination capable of the new use of making rigid pipe and rigid sleeve couplings capable of irrigating undulating irregular ground by loosely connected unthreaded pipe. "In such cases it requires but little physical change to make an invention."

H. K. Regar & Sons, Inc. v. Scott & Williams, Inc.,
63 Fed. (2d) 229, 231 (C. C. A. 2):

"When old devices are changed at all, the change may be dictated *by a new conception, which it took originality to conceive*. Strictly, the old device is not then put to a new use; the new use begets a new device. *In such cases it requires but little physical change to make an invention.*"

COOPERATION OF ELEMENTS OF THE COMBINATION.

Let it be assumed that each individual element of claim 3 is to be found in some prior patent, some trade catalog or somewhere in public use. Yet, the combination in a relationship embodying the mental concept is not to be found anywhere; that is, there is not found in any prior art the new idea or concept of a pipe line in which lengths of rigid unthreaded pipe may be secured against pressure blow-outs, and yet maintain a leakproof, tight joint, without interfering with a hinged relationship of the pipes at the joint,

and at the same time retain the facility of connecting and disconnecting the joint to provide portability. In the patent in suit, and particularly within the provisions of claim 3, there is a cooperation of elements to effectuate this new and useful concept. The sleeve is rigid, adapting itself (as the patentee says), to withstand the rough handling to which they are submitted as the pipe lines are thrown about in the fields and in factories". At least one end of the sleeve is "smooth" and serves to receive the "rough" unthreaded pipe end, and likewise has an internal groove which serves to receive and hold an elastic packing member. That packing member consists of two integrally joined portions; one of those portions, the patent says, is held in a recess and provides "a specially simple fixation". Being "held" in the groove, it does not move out of the groove when the unthreaded pipe end is inserted or withdrawn, nor when the joined pipes have their opposite ends moved laterally. The flange also maintains a seal against the wall of the groove, regardless of what relative hinged movement occurs between the joined pipes; the other integral portion of the packing member is a free cylindrical part enclosing the unthreaded pipe end and moves with the pipe, constantly maintaining a seal against the unthreaded pipe end, regardless of the angular relation of the axis of the sleeve and the axis of the unthreaded pipe; that is, the flange portion of the packing remains co-axial with, and seals the sleeve, whereas, the free cylindrical portion of the packing member moves co-axially with, and seals against, the unthreaded pipe, the two portions

of the packing being the means by which "a certain degree of flexibility is imparted to the pipe line". (Exhibit 11 Tr. 385, patent page 1, line 26) and witness Vale (T. R. 107-112). There is yet another element of the combination consisting of means for hingedly securing the sleeve on the unthreaded pipe end. That this element cooperates with the other elements is demonstrated by defendants themselves when they stipulate (T. R. 31, 32, Par. 4), that defendants purchase the tubular portions of the couplings including the elastic gasket (Exhibits 3, 8, 47 and 48) from a Mr. Pierce and then, themselves, complete the combination of the claim by attaching the respective hook and latching lock of those exhibits. Those elements are certainly not added for esthetic effect, and would be added only and solely to make the other elements functionally and practically effective. Conduit lines employing this type of coupling are under considerable internal pressure. They cannot blow loose longitudinally in direct axial alignment because reinforced by a line of end-to-end pipe, but they will blow loose at the joint or coupling by moving laterally, unless positively held together (Vale, T. R. 118, Hanson T. R. 355). In a trench, as in buried gas and water mains, the problem is not so acute as the dirt provides a lateral buttress; in flood or surface irrigation there is no appreciable internal pressure. But this joint is for "the facility * * * to adapt itself to the irregularities of the ground", "especially for showering, irrigating" (Exhibit 11, T. R. 385, patent page 1, lines 73-74, and line 4). Therefore, the provision of a means to hold the pipes in juxtaposition,

without destroying the hinged relationship of the sleeve and inserted pipe end, nor devitalizing the two sealing factors of the elastic packing member. It is therefore apparent that there is cooperation between the rigid sleeve, the two integral portions of the unitary packing member, the unthreaded pipe end, and a means for securing the sleeve to the unthreaded pipe end while maintaining the flexibility. Each element may act according to the law of its own being, but each is capacitated to contribute to the common end.

San Francisco Bridge Co. v. Keating (C. C. A. 9), 68 Fed. 351, 354 (quoting from *National Cash Register Co. v. American Cash Register Co.* (C. C. A. 3), 53 Fed. 371:

“This suggestion (of aggregation) is based upon the allegation that each of the elements associated by Campbell does not qualify every other of them; but this is true only in the sense that each does not modify or change the characteristic mode of action or method of operation of the others. In doing its appointed share toward effecting the single result achieved by the cooperation of all, each element acts, of course, *according to the law of its own being*; but though, of necessity so acting, it is still none the less combined with the others, and does ‘qualify’ each and all of them (not their distinctive methods of operation), in the sense that each is, by the cooperation of the others, capacitated to contribute, by acting in its own peculiar way, to the common end, which, without the cooperation of each and every other of the coordinated elements, it would be powerless to accomplish or advance.”

Also, to the same effect :

H. J. Heinz v. Cohn (C. C. A. 9), 207 Fed. 547,
557 et seq.;

Sachs v. Hartford Electric Supply Co. (C. C. A.
2d), 47 Fed. (2d) 743, 8 Pat. Qr. 302.

A very apropos decision is the recent (1941) decision of this Court quoted below, dealing with the same general subject of the present suit—pipes and couplings or joints thereof. All the individual elements of the claim were old. The art was old and there was no new and meritorious concept of accomplishing a tremendously beneficial result such as was accomplished by the Lanninger invention. But, in structural elements, as in the Lanninger patent here in suit, there were old pipes, one received within another, with packing between the two, and functional relationship of slidability. The patentee accomplished something new as a beneficial result by most simple means. This Court said, *Payne Furnace and Supply Co. v. Williams-Wallace Co.* (C. C. A. 9, 1941) 117 Fed. (2d) 823:

“The invention disclosed, if invention there be, resides in the combination of known elements—namely, in a composite pipe section comprising an inner core pipe, an external pipe, and insulating material interposed between the two, plus the functional relationship of slidability of the inner pipe providing a construction in which, necessarily, the inner and outer stacks are supported independently of each other when the unit sections are joined together.

“The combination claimed as invention is as simple as it has proved useful * * *

“The flue pipe art is old, yet has its problems; and it would seem that Stadtfeld’s combination has overcome a number of important difficulties in this field. His pipe, as the trial court found, has gone into wide and successful use in the building industry. Appellant, with Stadtfeld’s work before it, has manufactured and put on the market an exact copy, and in its advertising matter has proclaimed as novel the features relied on by the patentee as disclosing invention.” * * * The patent is entitled to the presumption of validity; and the citations to the prior art fail to overcome the presumption.”

PRESUMPTION OF VALIDITY OF PATENT.

Not only is it demonstrated that a new and useful result is accomplished by the practical application of the structure of claim 3 of the Lanninger patent, but the patent is presumed to be valid, and presumed to be a valid combination until the contrary is proved by a defendant beyond a reasonable doubt. This proposition has been so repeatedly affirmed by this Court that mere citation of authority for the convenience of the Court is believed to be sufficient.

Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33 (78 U. S.);

Cantrell v. Wallick, 117 U. S. 689, 29 L. Ed. 1017;

Schumacher v. Buttonlath Mfg. Co. (C. C. A. 9), 292 Fed. 522, 531;

- Reinharts, Inc. v. Caterpillar Tractor Co.* (C. C. A. 9), 85 Fed. (2d) 628, 630;
San Francisco Cornice Co. v. Beyrle (C. C. A. 9), 195 Fed. 516;
Kawneer Co. v. McHugh, et al. (C. C. A. 9), 51 Fed. (2d) 560, 562, 563;
Payne Furnace and Supply Co. v. Williams Wallace Co. (C. C. A. 9), 117 Fed. (2d) 823.
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PRESUMPTION OF VALIDITY IS EVEN STRONGER WHERE PATENT IS GRANTED OVER ART CITED BY A DEFENDANT.

With one exception, all of the prior patents in evidence were cited by the Patent Office during course of prosecution of the Lanninger application. (See File Wrapper, Defendants' Exhibit 45.) They are McGowan, 222,195 (Exh. 25, T. R. 391); Gorter, 580,084 (Exh. 32, T. R. 407); Anderson, 811,812 (Exh. 40, T. R. 433); Jones, 999,169 (Exh. 27, T. R. 395); Berry, 1,255,577 (Exh. 36, T. R. 413); Serrell, 1,292,524 (Exh. 39, T. R. 429); and Ward, 1,448,646 (Exh. 37, T. R. 423).

The one exception not cited by the Patent Office is the Patent to R. M. Close, 685,818 (Exh. 29, T. R. 401).

The presumption of validity is especially strong where the pertinent patents relied upon by defendants as an anticipation have been reviewed by the Patent Office and the patent in suit has been granted as having patentable novelty in the combination over rep-

representative types of patents relied upon by a defendant.

J. A. Mohr & Sons v. Alliance Securities Co. (C. C. A. 9), 14 Fed. (2d) 799:

“and the presumption that a patented combination is new and useful and embodies invention has added force where, as here, it appears that the patents relied upon as showing anticipation were considered by expert Patent Office officials. While their judgment is not absolutely binding on a Court, it is entitled to great weight and is to be overcome only by clear proof that they were mistaken and that the combination lacks patentable novelty. *Fairbanks v. Stickney*, 123 Fed. 79 (C. C. A.); *Hale and Kilburn Mfg. Co. v. Oneonta C. & R. S. Ry.* (C. C.), 129 Fed. 598; *MacClemmy v. Gilbert* (D. C.), 221 Fed. 73; *New Jersey Wire Cloth Co. v. Buffalo Expanded Metal Co.* (C. C.), 131 Fed. 265.”

To the same effect:

General Electric Co. v. Sava Sales Company (C.

C. A. 6th), 82 Fed. (2d) 100, 29 Pat. Qr. 59;

Gairing Tool Co. v. Eclipse Interchangeable

Counterbore Co., 48 Fed. (2d) 73, 75 (C. C.

A. 6);

Gordon Form Lathe Co. v. Walcott Machine

Co., 32 Fed. (2d) 55 (C. C. A. 6th);

Smokador Mfg. Co. v. Tubular Products Co.

(C. C. A. (2d) 31 Fed. (2d) 255.

SIMPLICITY DOES NOT NEGATIVE INVENTION.

The fact that the combination of elements may seem simple now in the light of the disclosure by Lanninger of a new concept for accomplishing a new and useful purpose does not negative the quality of invention at the time that Lanninger made his invention in 1922 and filed his application in the United States in 1923. The situation must be viewed in the light of the problem and the need twenty years ago. *Western Electric Co. Inc. v. Wallerstein* (C. C. A. 2), 60 Fed. (2d) 723, 15 Pat. Qr. 9:

“With the knowledge of today and the aid of curves actually obtained by using the negative grid voltage, it is now easy to reason that a negative grid bias should be used. But that is not the test of invention. *Diamond Rubber Co. v. Consolidated Rubber Tire Co.*, 220 U. S. 428, 31 Sup. Ct. 444, 55 Law. Ed. 527. *The test is what was known in the art in 1912 when Lowenstein made his invention.*”

Lakeside Cheese Co. v. Shefford Cheese Co. (C. C. A. 7), 72 Fed. (2d) 497, 23 Pat. Qr. 184;

Dow Chemical Co. v. Williams Bros. Well Treating Corp. (C. C. A. 10), 81 Fed. (2d) 495, 496-7.

Looking at the situation from the standpoint of the art in 1922 or 1923, it is apparent that those skilled in the art had failed to see or recognize the advantages of the combination of elements which Lanninger did recognize. A part of Lanninger's inventive concept lay in the fact that he recognized the ex-

istence of a problem, i. e., if an agriculturalist must buy 40,000 lineal feet of pipe to irrigate 40 acres of uneven land, then that land could not be irrigated from the financial standpoint. He recognized the cause of the lack of agricultural development of irregular ground, and he also discovered a means to overcome that problem with a line of portable surface conduits connectible and disconnectible in the field without tools, and flexibly jointed to adapt them to irregularities of the ground. Even though the Pierce patent (Exhibit 22, T. R. 387) does not disclose a flexible joint, defendants' expert witness McDougall, who prepared that application (T. R. 295), and who has been practicing the profession of mechanical engineer since 1907, stated in that patent in 1931 (eight years after Lanninger's filing date), "The problem here involved is many years old and many attempts have been made to solve it", and that "all previous devices have been commercial failures". Not only had Lanninger solved that problem at least eight years previously, but had provided a flexible joint in so doing. The recognition and solving of this problem by Lanninger is akin to the discovery of the problem of the patentee in the *Eibel Process Paper* case, in which the Supreme Court said:

Eibel Process Co. v. Minnesota & Ontario Paper Co., 261 U. S. 45, 67-68, 67 L. Ed. 523, 534:

"The fact that in a decade of an eager quest for higher speeds this important chain of circumstances had escaped observation, the fact that no one had applied a remedy for the consequent

trouble until Eibel, and the final fact that when he made known his discovery, all adopted his remedy, leave no doubt in our minds that what he saw and did was not obvious, and did involve discovery and invention.”

Consolidated v. Window Glass (C. C. A. 3), 261 Fed. 373:

“It is to be noted that the inventions made involve, as stated by Judge Thompson in the extract quoted above, the unusual feature of first locating or discovering the difficulty to be overcome and its relation to the whole problem, before any inventive steps were taken to solve it. In other words, these patents involve, so to speak, two series of inventions: First, discovering the difficulty; and, second, discovering means to overcome that difficulty.”

Miehle v. Whitlock (C. C. A. 2), 223 Fed. 647, 650:

“Patentable novelty is sometimes found in discovering what is the difficulty with an existing structure and what change in its elements will correct the difficulty, even though the means for introducing that element into the combination are old and their adaption to the new purpose involves no patentable novelty.”

That the patentee accomplished a new and useful result by what may now appear to be very simple means does not detract from the quality of invention, but, to the contrary, demonstrates the quality of invention. As this Court has said, *Kitchen v. Levison*, (C. C. A. 9), 188 Fed. 658:

“There may be the highest form of invention in some of the simplest improvements on the prior art.”

Snow v. Keller-Thomason (C. C. A. 9), 241
Fed. 119:

“Indeed, the most simple contrivances sometimes present the clearest examples of the product of inventive faculty.”

And see:

Webster Loom Co. v. Higgins, et al., 105 U. S.
580, 26 L. Ed. 1177, 1181;

Expanded Metal Co. v. Bradford, 214 U. S.
366, 53 L. Ed. 1034;

Potts v. Creager, 155 U. S. 597, 39 L. Ed. 275;

*Diamond Rubber Co. v. Consolidated Rubber
Tire Co.*, 220 U. S. 428;

Washburn v. Barbed Wire Co., 143 U. S. 275,
36 L. Ed. 154, 12 Sup. Ct. 443.

We sometimes hear it said in these later years that the Supreme Court has departed from the pristine doctrine that simplicity does not negative invention. But we do not believe that to be the case. In plain, simple terms, we believe the Supreme Court has said in substance, if you merely accomplish the same old thing which was done before, but do it by a change of mechanism, you must demonstrate a new idea of means which has a flash of genius of such character as to be beyond mechanical skill; but if you recognized an unsolved problem to be overcome and conceived a new idea to solve that problem, it makes no

difference how simple your means may be to carry your new concept into effect. Under such circumstances, the Supreme Court has not departed from the age-old classics of simplicity supporting invention of a high order, such as stated in *The Barbed Wire Patent* case (1892), 143 U. S. 275, 283, 36 L. Ed. 154, 158, and the *Collar Button* case (*Krementz v. Cottle*, 1893), 148 U. S. 556, 559, 37 L. Ed. 558, 559. Those cases have been repeatedly cited by the Supreme Court as authority and repeated at least as recently as 1935 in the decision delivered by the present Chief Justice Stone in *Smith v. Snow*, 294 U. S. 1, 79 L. Ed. 721, reversing the Eighth Circuit and affirming the Ninth Circuit (*Waxham v. Smith*, 294 U. S. 20, 79 L. Ed. 733), in a case in which the invention of the patent which was sustained as valid and infringed consisted of changing the prior art methods of egg incubation from the step of circulation of air by thermodynamics to mechanically impelled circulation, because the patentee had developed a new idea or concept that elimination of foul air and the conservation of moisture were desirable factors in increasing the efficiency of the incubation of eggs, a very old and highly developed art. This was only the carrying forward of the repeatedly affirmed principle of the so-called *Eibel Paper* case of 1923 (261 U. S. 45, 63, 67 L. Ed. 523, 532), the earlier *Morley Sewing Machine* case of 1888 (129 U. S. 263, 32 L. Ed. 715), and the still earlier gondola coal car case of *Winans v. Denmead* of 1853 (15 How. 341, 14 L. Ed. 721). For more than a hundred years this has been an authoritative principle settled by the Supreme

Court, and its reiteration in 1935 is not a new doctrine. The principle is masterfully stated in 1922 by the Supreme Court in the *Eibel Paper* case, and is particularly appropriate here because the problem involved was a recognition of difficulty encountered due to gravity flow of liquids. The mechanism employed in Eibel's invention was all old in a paper-making machine. Eibel did not add or subtract any new mechanical element. What he did was to recognize that an existing difficulty in rippling of paper in the making thereof was caused by the fact that the wire belt upon which the paper stock was fed was not synchronized in movement with the feed of the paper stock. This wire belt had previously been inclined downwardly from an elevation of about 3 inches for liquid drainage, and all Eibel did was to increase its incline by raising its end elevation from three inches to twelve to twenty inches, but not adding or subtracting any mechanical element to the paper-making machine—

“Accordingly he proposed to add to the former speed of the stock by substantially tilting up the wire and giving the stock the added force of the downhill flow” (p. 52).

“Eibel's high or substantial pitch was directed toward a wholly different object from that of the prior art” (p. 67).

“In administering the patent law the court first looks into the art to find what the real merit of the alleged discovery or invention is, and whether it has advanced the art substantially. If it has done so, then the court is liberal in its construction of the patent, to secure to the inventor the

reward he deserves. If what he has done works only a slight step forward, and that which he says is a discovery is on the border line between mere mechanical change and real invention, then his patent, if sustained, will be given a narrow scope, and infringement will be found only in approximate copies of the new device. It is this differing attitude of the courts toward genuine discoveries and slight improvements that reconciles the sometimes apparently conflicting instances of construing specifications and the finding of equivalents in alleged infringements. In the case before us, for the reasons we have already reviewed, we think that Eibel made a very useful discovery which has substantially advanced the art. His was not a pioneer patent, creating a new art; but a patent which is only an improvement on an old machine may be very meritorious and entitled to liberal treatment" (p. 63).

Now, of course, plaintiffs do not contend that Lanninger was the first to recognize the problem of conveying water in pipes over irregular ground, since that has been done for centuries; nor of the bell and spigot joint, nor of a hinged connection of pipes, nor of a flanged packing; nor of a means to secure pipe together. But Lanninger recognized the problem that in practical irrigation of irregular ground it was highly desirable that pipes with unthreaded or "rough ends" be employed for cheapness; portability to save duplication of permanently installed rigidly connected pipe; ease of connection and disconnection; flexibility at the joint; and maintenance of a tight joint. He knew, as had been known for centuries, that water required pressure to flow upwardly against the force

of gravity and that irregular ground had upward inclines as well as downward inclines. He did not have to state this in his patent. "That which is common and well known is as if it were written out in the patent and delineated in the drawings" (*Webster Loom Co. v. Higgins*, 105 U. S. 580, 586, 26 L. Ed. 1177, 1179). And he recognized that he must overcome that pressure and prevent the pipes from blowing apart, without destroying the other factors for solving his problem. Thereupon, he secured his coupling member or sleeve on the pipe having the unthreaded end. But he did not provide a rigid securing means such as the flanged pipe with bolt and nut. He provided "means for hingedly securing"—a means which would secure the sleeve on the unthreaded pipe end and preserve the flexibility and tightness of the joint. Thus, he provided means by which there might be accomplished overhead or sprinkler irrigation in a portable irrigating system which does not depend on gravity flow, but has hydraulic pressure and is therefore adapted to undulating ground. It was this new idea of possibilities, this new conception of utilizing irregular ground under portable artificial irrigation and the application of the remedy, for which Lanninger, like Eibel, was entitled to be rewarded in his patent.

COMMERCIAL SUCCESS.

In addition, the evidence establishes by stipulation that the plaintiffs have manufactured and sold large

quantities of devices like Exhibit 17, and Hanson's testimony (T. R. 360-361) discloses that the variations of structural form from the exact form of the Lanninger drawings are merely to facilitate economical manufacture in quantity, and so that the device may be galvanized against rusting, and the hot galvanizing drained from the sleeve and not fill the interior groove. But its mode of operation and its result is the same as Exhibit 70, which specifically conforms to the design of Fig. 1 of the Lanninger patent in suit. The device of the patent exemplified by Exhibit 17 has been sold in large quantities (T. R. 329-334) and has received favorable acceptance. This is more than mere commercial success which might be dependent upon adroit and successful advertising or good salesmanship; the people who gain a living from the soil do not buy irrigation installations on the whim of advertising. The commercial success is a demonstration by actual users that there was something novel and useful in the combination of the patent that they had not been able to obtain from the disclosures of the prior art.

Eibel Process Co. v. Minnesota & Ontario Paper Co. (1922), 261 U. S. 45:

“The fact that the Eibel pitch has thus been generally adopted in the paper-making business, and that the daily product in paper making has thus been increased at least 20 per cent over that which had been achieved before Eibel, is very weighty evidence to sustain the presumption from his patent that what he discovered and invented was new and useful.”

Research Products Co. v. Tretolite Co. (C. C. A. 9, 1939), 106 Fed. (2d) 530, 532:

“So great and immediate a success speaks strongly of invention, adding emphasis to the strong presumption of invention, raised by the issuance of the patent.”

And to the same effect,

Temco Elec. Motor Co. v. Apco Mfg. Co. (1928), 275 U.S. 319, 72 L. Ed. 298;

Owen v. Perkins Oil Well Cementing Co. (C. C. A. 9), 38 Fed. (2d) 30;

Sherman, Clay & Co. v. Searchlight Horn Co., 214 Fed. 86 (C. C. A. 9);

Vacuum Cleaner Co. v. American Rotary Valve Co., 227 Fed. 998;

Graham Paper Co. v. International Paper Co.,
International Paper Co. v. Graham Paper Co., 46 Fed. (2d) 881, 884, 885;

Berry v. Robertson, 40 Fed. (2d) 915, 921.

PLAINTIFFS' COMMERCIAL DEVICE OF EXHIBIT 17 IS MADE ACCORDING TO THE LANNINGER DISCLOSURE.

But defendants urge (Defendants' Brief, page 28) that the commercially successful device of Exhibit 17 is not made in accordance with claim 3 of the Lanninger patent. They concede that it contains all the elements except the “flange” packing (Defendants' Brief, page 28). *Knight's Mechanical Dictionary*, page 876 (photostat Exhibit 96), defines a flange as a rib or rim. It does not have to be of a particular shape

(Vale, T. R. 141); defendants' expert McDougall agrees that a "flange" may assume many diverse shapes (T. R. 177), where he says, "Now a flange is a rib or ridge", and he describes numerous shapes and uses; also "So a flange is always an outstanding part". Plaintiffs' witness Hanson says that the radially extended portion of the packing of Exhibit 17 is a "flange" (T. R. 357) and that the mode of operation is the same as in the Lanninger patent (T. R. 360). It is true that defendants' expert Mr. McDougall, when he is on his guard, says that Exhibit 17 has a "V section packing in principle *precisely the same thing as used in 48*" (or 47), the latter two exhibits being the type of the defendants' alleged infringing structures. Now, when Mr. McDougall is not so closely on guard, what does he clearly recognize as a "flange"? In his testimony (T. R. 321) relative to the prior art patent to Berry (Exhibit 36, T. R. 413), Mr. McDougall has no difficulty at all in readily recognizing a member as a "flange L", which form a "V section" with the part to which it is attached, though those parts happen to be made of metal (T. R. 321). A glance at the element "L" of Figs. 3 and 4 of Exhibit 36 (T. R. 416) will demonstrate that when defendants' expert is speaking casually as a mechanical engineer of nearly forty years experience, he refers to a protruding member as a "flange" when it makes a V section opening with its base. And again, take the testimony of defendants' second expert, Mr. Finkbeiner, a graduate mechanical engineer of nearly forty years experience;

on direct examination for which he is prepared, he states that Exhibit 4 is a "V type or U type packing", but when he is testifying extemporaneously about Exhibit 47 (defendants' accused structure), he spontaneously, and without any prompting, refers to the two joined legs of the packing of defendants' packing member (Exhibit 47) as "inside flange" and "outside flange", not once only, but repeatedly (T. R. 275-276). Bearing in mind that Mr. McDougall testified (T. R. 227) that the packing member of plaintiffs' Exhibit 17 is the same in principle as the packing member employed by defendants' structure, it follows that the packing member of Exhibit 17 must have a flange. It is also significant that defendants' witness Mr. Pierce, who made and sold defendants' coupling sleeve, including the packing therein (T. R. 31, par. 4), has no difficulty in recognizing this questioned part of the defendants' packing as an outer rim, which is within the definition of "flange" in *Knight's Mechanical Dictionary* (Exhibit 96). Since Mr. McDougall says the packing member of Exhibits 47 and 48 and Exhibit 17 are the same in principle, it follows that all of defendants' witnesses as well as plaintiffs' witnesses recognize that plaintiffs' commercial structure of Exhibit 17 and defendants' accused structures of Exhibits 47 and 48 all have a "packing of elastic material * * * having a flange frictionally retained in the groove of said sleeve", as set forth in claim 3 of the Lanninger patent. But it is not its name, but what it does which is the determining factor. As the Supreme Court said in *Sanitary Refrigerator Co. v. Winters* (1929), 280 U.S. 30, 41-43, 74 L. Ed. 147:

“if two devices do the same work in substantially the same way, and accomplish the same result, they are the same, even though they differ in name, form or shape.”

Exhibit 17 may present features which are specific improvements on the specific structure of the Lanninger *drawings*, but it is within the Lanninger description and also claim 3. The familiar rules discussed elsewhere herein are (a) that change of form does not avoid a patent, and (b) that the later device of an improver may yet be within an earlier, broader patent. Commercial success may properly be attributed to the commercial structure, Exhibit 17, as being made and sold by license under Lanninger's patent, and as being one factor demonstrating validity of the Lanninger patent.

**PRIOR ART NEITHER NEGATIVES VALIDITY NOR
NARROWS CLAIM 3.**

In analysis of the prior art, defendants' brief (pages 17-26) points out where individual elements of claim 3 may be found in modified forms in prior patents and prior publications. But claim 3 of the Lanninger patent is a combination claim. Defendants' brief does not point to any patent disclosing the combination of claim 3, nor to any prior art disclosing a concept of accomplishing the new result of a flexible leak-proof joint in a line of rigid pipe loosely or releasably connectible and disconnectible for portability, and having means to secure them together in maintained flex-

ible pipe-forming relation under pressure of liquid therein.

Defendants' discussion of specification II (page 17 of Brief) is apparently divided into two headings. Under the first heading (page 17 of brief), there is discussed the subject of aggregation of individual elements found in various patents and publications. The second heading (page 22 of brief) discusses the subject of anticipation of the combination of claim 3. Defendants rely on only two prior patents as anticipating the combination. These are the Jones patent of 1911 (Exhibit 27, T. R. 395) and the Berry patent of 1918 (Exhibit 36, T. R. 413).

Referring to the Jones patent, No. 999,169, it is in a non-analogous art of couplings for flexible hose, and the trial Court so held. The reason the art is not analogous appears from the Jones patent itself, which shows no flexibility of the joint, since the hose itself has all the needed flexibility without the joint contributing thereto. Not one word in the Jones patent refers to any flexibility in the coupling; and the intimate metal to metal contact shown between the receiving "socket 14" and the inserted "plain portion 19" demonstrates that no such flexibility in the coupling was intended nor is it possible. However, the Jones patent, firstly, is not for a "pipe joint in connection with pipes", secondly, there is no flexibility in the "joint" and, therefore, no "means for hingedly securing" a rigid sleeve on an unthreaded pipe end, and thirdly, in the packing or gasket 21 of the Jones patent the free cylindrical part of the gasket does not

enclose the unthreaded pipe end, as admitted by defendants' expert (T. R. 196). The gasket, therefore, is not a means whereby "a certain degree of flexibility is imparted to the pipe line" (Lanninger patent, Col. 1, line 26, Exhibit 11, T. R. 397), cooperating with a means for hingedly securing the parts to preserve the flexibility.

The other patent relied on by defendants' brief (Brief page 24), is Berry patent, No. 1,255,577 of 1918 (Exhibit 36, T. R. 413). It is the patent in which a perfect V angle is formed by the part L (see Figs. 2, 3 and 4) and which is nevertheless designated a "flange" by defendants' witness McDougall, as previously discussed. The Berry patent is not within the inventive concept of Lanninger. It is for a series of joints permanently and mechanically connected, the end of the inserted pipe member F being *threaded* to engage other mechanism such as the metal collar H and the annular rings P and Q which hold therebetween the flange of a gasket or packing S. Defendants' brief (Brief page 24) describes this as a "reversed flange" in an "annular groove, this time on the exterior of the reduced portion of the pipe extending into the bell". But it will be noted that the packing or gasket S has nothing to do with the flexibility, the packing merely serving as a packing and the flexibility being provided solely by the convex surface W of stop-ring V bearing on stop-ring H. But even if the inventive concept of Lanninger were present in the Berry patent, the structure would not have anticipated claim 3 because the Berry structure does not have an interior annular groove in the sleeve member into

which the flange of the packing member is frictionally engaged. Defendants' Brief and evidence finds no difficulty in referring to the *clamped* flange of the packing in the Berry patent as being "frictionally retained in the groove" (Brief page 24, and T. R. 192), whereas in discussing the Lanninger patent (Brief page 30) and the file wrapper at page 32, a "flange clamped in the sleeve" is something entirely different from a flange frictionally held. A clamp is one form of frictional holding; defendants' witness McDougall says this is not misleading (T. R. 208). However, Lanninger illustrated two forms in his drawings, saying the flange was held in groove e, and as an option, if desired to make it adjustable, it *could* be clamped. The Lanninger claim 3 provides "said *sleeve* having an interior annular groove in the inner surface" and the packing "having a flange frictionally engaged in the groove of *said sleeve*". Yet defendants' witness Mr. McDougall admits, as he must, that this is not shown by Berry. Though he says it is the same old principle, but reversed, he admits he has not read the description (T. R. 321). In *Temco Elec. Motor Co. v. Apco Mfg. Co.*, 275 U.S. 319, 327, 72 L. Ed. 298, 301, the Supreme Court held reversal of parts of a spring "by turning over on its back" did not anticipate when the alleged anticipation as a whole did not accomplish the same result as the patented structure.

Though defendants apparently do not rely on the other prior patents for the defense of anticipation, a word will be added as to each one in evidence, though none are for accomplishing the same purpose as Lanninger disclosed.

The McGowan patent, No. 222,195 of 1879 (Exhibit 25, T. R. 391) provides a rotatable joint in a goose-neck of a standpipe for replenishing water to railway water tanks. Surely an art not analogous to a line of pipe over irregular ground. There is no testimony relative to the McGowan patent. It discloses a rotary swivelled connection E, and a goose-neck terminal section which will swing open on a pivot I, and a cushioned bumper M against which an end of the goose-neck abuts. There is no sleeve in the sense of the Lanninger patent, there is no interior annular groove in the inner surface of a sleeve and there is no gasket or packing held in such a groove, and the gasket does not enclose an unthreaded pipe end. Nor does the gasket have any adaptability for providing a "degree of flexibility" as stated as being the function of the gasket in Lanninger's specification.

The Close patent, No. 685,818 of 1901 (Exhibit 29, T. R. 401) was also lacking in any explanatory testimony, so that we are not informed what factors of anticipation are supposed to be present in this patent. There is nothing in the Close patent to in any way even suggest that a flexible joint is provided thereby. In fact, the sleeve is provided with an "internal central rib B against which the ends of the pipe abut when in place in the sleeve" (page 1, line 43). Referring to the drawing of that patent, it is to be noted that there is barely a sliding clearance between the sleeve and the inserted pipe end, and no mention of any intended clearance at all. Therefore, it is apparent that the inserted pipe end when fulcrumed on the edge of the opening in the sleeve could not have any

real or intended flexibility if its end was against the rib B and its circumference had a mere sliding clearance relative to the internal wall of the sleeve. When considering the stated purpose of "laying gas and water mains in cities", it is apparent that no flexibility was necessary, since the Court may certainly take judicial notice of the fact that water and gas mains in cities are not flexibly joined, but are layed underground and packed around with dirt. Therefore, they can be neither flexible nor subject to blowing apart under pressure by lateral movement of the joint. Wherefore, the Close patent does not need and does not disclose any means for hingedly securing the sleeve and pipe relatively.

The Gorter patent, No. 580,084 of 1897 is next in order of exhibits (Exhibit 32, T. R. 407). This patent is a slip-joint having a "smooth fit" metal to metal contact; it is not flexible, but rotatively swivels. Therefore, it has no hinged relationship of the pipe portions, and consequently, in securing the pipes together, "No, there is no hinged means there" (to quote defendant's witness, T. R. 184). And again, the same witness, when asked if he found anything in the Gorter patent mentioning flexibility or hingability of the joint, stated, "I don't find anything" (T. R. 313).

The Ward patent, No. 1,448,646 of 1923 (Exhibit 37, T. R. 423), hardly needs comment. There is no testimony relative to it, and defendants' brief does not discuss it. A mere glance at the drawing (T. R. 425), demonstrates it has no relevancy to the matters here in issue.

The Serrell patent, No. 1,292,524 of 1919, is not for a pipe joint in connection with pipes, but is a bathroom or kitchen accessory to connect a faucet with a flexible hose.

That the ruling of the trial Court was correct in excluding hose connections as not relevant is shown by defendant's expert witness as to this Serrell patent (T. R. 194):

“flexibility was not needed there if they were going to put a hose on right there.”

And again (T. R. 193):

“It does not have a hinged connection, merely having a set screw ‘6’ * * *

No, it is not shown flexible.”

Even if the Serrell patent were relevant, it is obvious from the patent itself, that if the set screws “6” are tight, there is no hingability and if they are loose, the device will not remain mounted on the faucet.

The Anderson patent, No. 811,812 of 1906 (Exhibit 40, T. R. 433) is in a remote art of railway stand pipes. There is nothing to indicate it would or could be used in a line of flexibly connected pipes over irregular ground.

It is not for the same purpose and insofar as it has one or two individual elements which by chance come within the literal wording of claim 3 of Laninger, its resemblance is accidental. While it does have a bell 5 and an unthreaded end of pipe 6 extending thereinto, the “means for hingedly securing” is a fixed means 9 secured by bolts and is not the same

securing means of Lanninger, who, though his claim merely refers to “means for hingedly securing”, describes the means in his specification as being in conjunction and cooperation with an elastic gasket which serves to provide flexibility, and a readily connectible and disconnectible securing means provided by a “loosely inserted cotter pin d” and “the easy movement of the cotter pin in the borings of the hinge” (Exhibit 11, page 1, lines 66-72, T. R. 385).

But, even ignoring the difference of purpose or concept, the Anderson patent does not have an interior annular groove *in the sleeve or bell* with the flange of a gasket or packing held therein; it is the gasket and flange which provide flexibility in Lanninger, but not so in Anderson. To the contrary, the groove for holding the packing gasket of Anderson is on the exterior of the inserted pipe and the packing is held therein as an entirety by a coil spring 8 and a ring (not numbered), as shown in cross-section adjacent the reference character 7 in Fig. 4.

And that completes the prior art. There is not one patent in the entire group that indicates that those patentees made any pretense of accomplishing the purpose and idea of Lanninger, and none of them disclose the physical structure of the combination of claim 3. Likeness in some individual important particulars without accomplishing similar results, is not anticipation. *Consolidated Safety Valve Co. v. Crosby, et al.*, 113 U. S. 158, 28 L. Ed. 939 at 943.

“In regard to all of the above patents, adduced against Richardson’s patent of 1866, it may be generally said, that they never were, in their day, and before the date of that patent or of Richard-

son's invention, known or recognized as producing any such result as his apparatus of that patent produces, as above defined. Likenesses in them, in physical structure, to the apparatus of Richardson, in important particulars may be pointed out, but it is only as the anatomy of a corpse resembles that of the living being. The prior structures never effected the kind of result attained by Richardson's apparatus, because they lacked the thing which gave success. * * *''

SEPARATE ELEMENTS GATHERED FROM MANY SOURCES
DO NOT ANTICIPATE.

It is usually very easy to search all of the mechanical devices in any art and find one element here and another there and another some place else, and then say that if all of these elements are brought into juxtaposed cooperative relationship to accomplish a new and useful result, it would involve only a transposition of parts, or that all the variations operate in the same way. But anticipation is not to be determined in that manner. *Parks v. Booth*, 12 Otto 96, 102 U. S. 96, 26 L. Ed. 54:

“Where the thing patented is an entirety, consisting of a separate device or of a single combination of old elements incapable of division or separate use, the respondent cannot make good the defense in question by proving that a part of the entire invention is found in one prior patent, printed publication or machine, and another part in another, and so on indefinitely, and from the whole or any given number expect the court to determine the issue of novelty adversely to the complainant.”

And as stated by this Court, *J. A. Mohr & Son v. Alliance Securities Co.* (C. C. A. 9), 14 Fed. (2d) 799:

“It will not do to say that the Fisher combination might by a slight modification be made to perform the same functions. It is to be borne in mind that the prior art here relied upon consists entirely of patents and that when it is sought by means of prior patents to ascertain the state of the art, nothing can be used except what is disclosed upon the face of those patents. They cannot be reconstructed in the light of the invention in suit, and then used as a part of the prior art.”

See also:

Stebler v. Riverside Heights Orange Growers (C. C. A. 9), 205 Fed. 735;

Payne Furnace & Supply Co. v. Williams-Wallace Co. (C. C. A. 9, 1941), 114 Fed. (2d) 823;

Cadillac Motor Car Co. v. Austin, 225 Fed. 983 (C. C. A. 6);

Owens Co. v. Twin City Separator Co. (C. C. A. 8), 168 Fed. 259.

**ANTICIPATING PATENTS MUST CLEARLY DISCLOSE
THE SAME INVENTIVE IDEA.**

Seymour v. Osborn, 78 U. S. 555;

Skelly Oil Co. v. Universal Oil Products Co.,
31 Fed. (2d) 427, 431 (C. C. A. 3rd);

Wellman, et al. v. Cramp, 3 Fed. (2d) 531 (C. C. A. 6th);

A. B. Dick Co. v. Underwood Typewriter Co.,
246 Fed. 309, 312 (S. D. N. Y. 1917).

ACCIDENTAL RESULTS AND EMBRYONIC IDEAS
DO NOT ANTICIPATE.

Topliff v. Topliff, 145 U. S. 156, 36 L. Ed. 659,
661;

*Eibel Paper Co. v. Minnesota & Ontario Paper
Co.*, 261 U. S. 45, 66;

Tilghman v. Proctor, 102 U. S. 707, 26 L. Ed.
279;

Los Alamitos Sugar Co. v. Carroll (C. C. A. 9),
173 Fed. 280;

Electric Candy Machine Co. v. Morris, 156 Fed.
972;

*H. D. Smith & Co. v. Peck Stow and Wilcox
Co.* (C. C. A. 2), 262 Fed. 415;

Canda v. Michigan Malleable Iron Co., (C. C.
A. 6), 124 Fed. 486;

*United Verde Co. v. Pierce-Smith Converter
Co.* (C. C. A. 3), 7 Fed. (2d) 13, 16;

Pittsburgh Reduction Co. v. Cowles, 55 Fed.
301, 307;

Wickelmann v. Dick (C. C. A. 2), 88 Fed. 264,
266 and 267.

It is manifest that there is nothing in the prior art to anticipate the Lanninger patent in suit. It is presumed to be valid and that presumption has not been overcome beyond a reasonable doubt, nor by a preponderance of evidence, nor by any evidence at all. It not only meets every historical rule for a valid patent, but meets the much discussed principle of a "flash of genius" in providing means whereby irrigation may be accessible to thousands of acres of fertile but irregular ground at a price which is

practically possible. No one prior to Lanninger had this “flash of genius”.

It is believed that that observation on the quality of invention is in substance a rule long observed, and previously quoted herein, “the birth of an idea * * * a concept demonstrated to be true by practical application or embodiment in tangible form”, a new concept beyond mechanical skill and reduced to practical form to make it available and useful by novel means.

Trabon Engineering Corp. v. Dirkes (C. C. A. 6, 1943), Advance Sheets U. S. Pat. Quar. of July 17, 1943, Vol. 58, page 97) :

“We do not interpret the observation as indicating anything more significant than that the quality of invention is ‘something more’ than expected mechanical skill. Nor do we read the phrase as another conscious effort to define the indefinable.”

Had Lanninger’s patent entered an old and highly developed field or been for a mere change in physical structure to accomplish an old result, there might have been grounds for application of the “mechanical skill” doctrine, but the prior art shows no prior conception of Lanninger’s idea for “showering and irrigating” “over irregular ground” by a flexible portable rigid pipe system. The invention, therefore, involves more than mechanical skill and includes “the birth of an idea * * * a concept demonstrated to be true by practical application or embodiment in tangible form” by means not disclosed in any prior art.

SPECIFICATION I—FLEXIBLE HOSE COUPLINGS ARE
NON-ANALOGOUS ART.

Before leaving the subject of anticipation, it seems in logical order to discuss defendants' first specification of error, which is that the trial Court erred in declining to consider the art of coupling flexible hose as analogous to the art of flexible couplings for lines of pipe. The District Court admitted the first two patents offered on flexible hose couplings (Serrell, Exhibit 39, and Jones, Exhibit 27), both of which demonstrated that the problem to be overcome was not the same as in the Lanninger patent, and the Court thereupon commented that the art was non-analogous (T. R. 198). The defendants' witness McDougall testified as to the Serrell patent that it is not shown as a flexible coupling (T. R. 193) and that "the flexibility evidently was not needed there if they were going to put a hose on right there" (T. R. 194).

Defendants acquiesced in the ruling of the Court and did not offer further hose couplings in evidence. Rule 43(c) provides the procedure available when evidence is excluded, but the provisions of that rule were not invoked by defendants. Obviously, Rule 43(c) is a necessary and salutary one for the orderly consideration of appeals; otherwise, a party may seek a reversal of a judgment on conjecture of what might have been offered and yet was not.

The problem of analogous and non-analogous art is a difficult one to define objectively. After analysis of the cases the Supreme Court said in *Potts v. Creager*, 155 U. S. 597, 39 L. Ed. 275, a case which

involved change of glass bars to steel bars on the periphery of a grinding cylinder:

“but if the relation between them (the arts) be remote, and *especially if the new use of the old device produce a new result*, it may at least involve an exercise of the inventive faculty.”

* * * * *

“Not only did they discard the glass bars, and substitute others of steel, but *they substituted them for a purpose wholly different* from that for which they had been employed. * * * The result appears to have been a new and valuable one—so much so that within a short time thereafter, defendants themselves obtained a patent upon a machine of their own to accomplish it.”

(And Pierce, manufacturer of defendants’ coupling sleeve and gasket, paid Lanninger’s patent the same tribute (Exhibits 22 and 56)). A “purpose wholly different” in which “the result appears to have been a new and valuable one” would seem to be a safe guide in the present case. Specific cases may be cited in large numbers, but the particular devices involved furnish little guide as to other particular devices. A few cases of non-analogous art are cited in a footnote.¹ The rule in the *Potts-Creager* case appears to have been the rule followed recently by the Supreme Court in invalidating the patent for transferring the use of

¹*Lakewood Engineering Co. v. Walker* (C. C. A. 6, 1928), 23 Fed. (2d) 623; *Western Electric v. LaRue*, 139 U. S. 601, 35 L. Ed. 294; *General Co. v. Bullock* (C. C. A. 6), 152 Fed. 427; *Aiken v. National Tube Co.* (C. C. A. 6), 163 Fed. 254; *Herman v. Youngstown* (C. C. A. 6), 191 Fed. 579; *Lyonan v. Bassick* (C. C. A. 6), 18 Fed. (2d) 29.

a thermostat from electric toasters and irons to a cigarette lighter. The problem, the purpose and mode of operation of the thermostat was the same and the result was the same. If a thermostatically controlled toaster were made smaller, it would serve as a cigarette lighter; if the cigarette lighter were made larger, it would serve as a toaster. There was no difference in problem. It was only a difference in size and a difference of whether a slice of bread or a cigarette was placed in proximity to the heated resistance wire. But difference of problem and purpose meets the rationale of practically all the decided cases.

“The *problem* which the manufacturer of barrels had to solve was one of an entirely different nature from that which confronted the maker of a tin can or of a paint pail; * * * it is essential that the Patent Office, as well as this court, have in mind the *problem* which the inventor was attempting to solve.” (*In re Bennett* (C. C. P. A. 1933), 65 Fed. (2d) 144.)

And so, in comparing air sprayers for oil with air sprayers for paint, the Court said, *W. N. Matthews Corp. v. Alliance Securities* (C. C. A. 8, 1930), 40 Fed. (2d) 879:

“Therefore, it is important to know what he (the inventor) was searching for. Hopkins was interested in a paint air brush. * * * *His problem was made by the conditions and difficulties pertaining to paint air brushes.* He was trying to meet those conditions.”

On the same reasoning, the Circuit Court of Appeals for the Sixth Circuit has recently held that rolls for

paper-making were not in an analogous art with rollers for clothes wringers, fruit presses and for reducing wood pulp, saying, "We think that the only pertinent prior art is that of the earlier paper rolls" (*Cincinnati Rubber Mfg. Co. v. Stowe Woodward, Inc.* (C. C. A. 6, 1940), 111 Fed. (2d) 239.) Also, this Court held in 1942 that, "There is no analogy between the shaping of raw rubber in a mold to form a solid rubber tire and the art of retreading a tire carcass of fabric or cord" (*Super Mold Corp. v. Bacon* (C. C. A. 9, 1942), 130 Fed. (2d) 860.)

True, a pipe and a hose will both convey liquid, but this invention is not for a pipe or a hose, but for "a pipe joint in connection with pipes one of which has an unthreaded end", wherein the joint or coupling provides the only flexibility in the line, whereas a hose line with a non-flexible joint is in an opposite art wherein the line is flexible and the joint is not. Or, as defendants' witness McDougall aptly states "flexibility evidently was not needed there". The "problem to solve" was not the same, the "purpose wholly different", and "the result appears to have been a new and valuable one", evidenced, if in no other way, by the same criterion set by the Supreme Court in the *Potts-Creager* case where the defendant claimed to be operating under a later patent on a similar device.

LANNINGER PATENT ENTITLED TO LIBERAL CONSTRUCTION.

Lanninger's means to solve the problem may have been as simple in physical structure as was Eibel's

raising of the breast roll of a paper making machine somewhat higher than it had previously been raised, yet he made a meritorious invention which is entitled to liberal treatment.

Eibel Process Co. v. Minnesota & Ontario Paper Co., 261 U. S. 45, 67 L. Ed. at 532:

“In administering the patent law the court first looks into the art to find what the real *merit* of the alleged discovery or invention is and whether it has advanced the art substantially. If it has done so, then the court is liberal in its construction of the patent to secure to the inventor the reward he deserves.”

And also in affirming this Court in *Waxham v. Smith*, 294 U. S. 20, in deciding a companion case, the Supreme Court said in *Samuel B. Smith v. E. H. Snow, et al.* (1935), 294 U. S. 1, 20, 79 L. Ed. 721, 732:

“If the matter (of broad or narrow construction), were doubtful, it is plain from what has been said that the character of the patent and its commercial and practical success are such as to entitle the inventor to broad claims and to a liberal construction of those which he has made. (Citing cases.) * * * In such circumstances, if the claim were fairly susceptible of two constructions, that should be adopted which will secure to the patentee his actual invention, rather than to adopt a construction fatal to the grant.”

To the same effect:

Klein v. Russell, 19 Wall. 433, 466, 86 U. S. 117, 22 L. Ed. 117;

Topliff v. Topliff, 145 U. S. 156, 171, 36 L. Ed. 658, 664;

Providence Rubber Co. v. Goodyear, 76 U. S. 788, 19 L. Ed. 566 at 568;

Keystone Mfg. Co. v. Adams, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103, 104;

Reinharts, Inc. v. Caterpillar Tractor (C. C. A. 9), 85 Fed. (2d) 628.

SPECIFICATION III—FILE WRAPPER OF LANNINGER PATENT.

Defendants' claim (Brief p. 30) that the file wrapper (Exhibit 45), demonstrates that Lanninger restricted the scope of his claims, and particularly claim 3, so that it cannot be construed to cover defendants' devices. This contention presupposes that defendants' devices do not have a "flange frictionally retained in the groove of said sleeve" (a fact on which the trial Court made a finding adverse to defendants), and that in the file wrapper Lanninger surrendered the novelty of such an element in his combination, except as limited to a right-angled flange. A contrary situation is shown by the file wrapper. Lanninger particularly and specifically pointed out to the Patent Office that he was claiming as an element of his combination in claim 2 (original claim 12) a clamped flange as shown in Fig. 3, and a frictionally retained flange, as shown also in Fig. 3, and in Figs 1 and 4.

Referring to the Lanninger File Wrapper (Exhibit 45), the first paragraph of the original description defines the invention broadly as including rubber packing cups. The second paragraph on page 1 states that

there is a certain "salient feature". That does not mean an *exclusive* feature. In ordinary language it usually means prominent or noticeable. "The salient *feature* (stated in the singular) is that the coupling sleeves are rigid and have cups of elastic material the neck of each cup fitting tightly on the corresponding pipe end." That description of "the salient feature" is shown in every illustration in the drawings. Then, following a comma, it is provided that the cups have "further", (that is "going beyond" or "additional to" the salient feature), "a flange which is clamped in the casing". And this "clamped" flange is shown in the drawings in only one place in the left hand portion of Fig. 3. In every other illustration the flange is shown held in the groove with no mechanically adjustable clamping, and the first paragraph on page 4 of the file wrapper clearly indicates that a mechanical clamp is intended only as an alternative form of holding the packing in the sleeve when it is desired to have it adjustably maintained there, in which event the flange could be clamped between two movable members. The defendant's expert witness recognized that a clamped flange was one form of a frictionally held flange in testifying relative to both the Berry patent (Exhibit 36) and Jones patent (Exhibit 27), when he says (T. R. 192 and 196) that the mechanically clamped flange of the packing in both those patents are "flanges frictionally retained in the groove of the sleeve".

There is no inconsistency in the file wrapper in the contention by Lanninger relative to the Anderson pat-

ent. In paper No. 11 of August 23, 1928, the Examiner rejected claims 12 and 13 on the Anderson patent. Claim 12 is the present allowed claim 2 and claim 13 is the present allowed claim 3 in suit. Claim 12 (allowed claim 2) contained the element "means for clamping the flange of said cup-shaped packing in the sleeve", whereas, claim 13 (allowed claim 3 in suit) originally provided for a "flange clamped in the groove", but was amended by paper No. 12, to read, "frictionally retained in the groove". In paper 12, under "Remarks", the applicant was arguing for allowance of the two claims 12 and 13. He did not say that the Anderson packing did not have a flange; in effect he admitted that the Anderson packing had a flange, but not a flange *clamped in the sleeve and a free portion extending into the sleeve and frictionally engaging the unthreaded end of the pipe*. He then states that it is obvious that the Lanninger application provides a packing means enclosed in the sleeve, and points out that both claim 12 (providing for a *clamped* flange) and claim 13 (providing for a *frictionally retained* flange) "*are generic to the same modification of the invention*", which is perfectly apparent from Fig. 3 (original Fig. 6) of the drawing showing both types of holding the flange. Then he specifically calls that difference in holding means to the attention of the Examiner by stating that in claim 13 (now claim 3 in suit) the sleeve is "*formed with a groove frictionally retaining the flange of the packing*" whereas "claim 12 defines the sleeve as including means for clamping the flange in the sleeve."

Far from being 100% variance between Lanninger's contention in the file wrapper and the testimony of Vale and Hanson, there is 100% accord. Lanninger relinquished nothing in the file wrapper. The fact that his claim 3 (old 13) is broader than claim 2 (old 12) detracts nothing from the breadth to which it is entitled. Neither defendants nor anyone else makes any showing of any intervening rights between the date of original filing of Lanninger's application in 1923 and granting of claim 3 in 1930.

Smith v. Snow, 294 U. S. 1 at 16; 79 L. Ed. 721 at 730:

“It is of no moment that in the course of the proceedings in the Patent Office the rejection of narrow claims was followed by the allowance of the broader claim 1.”

See also *Payne Furnace v. Williams-Wallace Co.* (C. C. A. 9th), 117 Fed. (2d) 823.

The patent describes and exemplifies one, and even two ways to practice the invention. The patentee may broadly claim all other ways in which his invention may be reduced to practice.

Smith v. Snow, supra;

Reinharts, Inc. v. Caterpillar Tractor Co. (C. C. A. 9), 85 Fed. (2d) 628;

G. H. Packwood Mfg. Co. v. St. Louis Janitor Supply Co. (C. C. A. 8, 1940), 115 Fed. (2d) 958.

DEFENDANT'S CONTENTION OF ESTOPPEL BY
EXHIBITS 87 AND 88.

Appellant's contention at pages 35-37 of Brief are novel, to say the least. Assuming *arguendo* that in 1939 the appellee, California Corrugated Culvert Co., was a licensee under Pierce patent No. 1,945,293 (a fact that is not shown by the record), what they did by the letter Exhibit 87-J (T. R. 239), was to review the additional Pierce application (Exhibit 88A) and suggest claims to Pierce which were limited to a specific structure having an interior lock (Exhibit 82). At no time and at no place did they say that such a device would avoid infringement of the dominating claims of the Lanninger patent. If by chance the Pierce idea of an internal lock proved to be patentable and proved to be a successful commercial device, California Corrugated Culvert Co., would have a license, so that it would have protection under the broader and earlier Lanninger patent and also the later and specific Pierce application (Exhibit '88), if granted. In an endeavor to assist Pierce to obtain claims on his specific structure, California Corrugated Culvert Co. suggested certain claims to be inserted in which the "connecting means" was "within said sleeve and independent thereof". That application was rejected by the Patent Office, but if it had been allowed, it would still have been for a structure within the broader earlier claims of the Lanninger patent, and California Corrugated Culvert Co. could not have made or used the specific later development of Pierce without license thereunder. This is merely a recognition of the time-honored rule that a later patentee is not excused from

infringement of an earlier broader patent, and that the earlier patentee may not use the specific means of the later patent without license. Illustrative of a long line of cases, are *Temco Elec. Motor Co. v. Apco Mfg. Co.*, 275 U. S. 319, 328; 72 L. Ed. 298, 302; *Simplex v. Hauser* (C. C. A. 9), 248 Fed. 919; *Bake-Rite Mfg. Co. v. Tomlinson* (C. C. A. 9), 16 Fed. (2d) 556.

But the additional fault of this defense is that the letter (Exhibit 87-J) was written to Mr. McDougall in a separate and specific matter. It did not appoint him an agent of the writer to make representations to third parties which would be binding on California Corrugated Culvert Co. Whatever he did in that respect he did of his own volition and on his own responsibility acting independently.

And in addition, it is to be noted that when defendants undertook to manufacture and sell the devices of Exhibits 3, 8, 47 and 48, they did not employ the interior hooks of the proposed Pierce improvement, but instead took the sleeves which were manufactured by Pierce without any securing means, and then completed the structure of claim 3 by adding the exterior securing means thereto, as shown by Lanninger. There is no evidence that plaintiffs ever stood by and permitted defendants to manufacture and sell devices of Exhibits 47 and 48, without protest, nor that plaintiffs did any act or made any representation to defendants that their devices would not or did not come within the earlier patent to Lanninger. Therefore, the cases cited by defendants' brief are not in point.

INFRINGEMENT.

Appellants' brief is predicated on the admission that all elements of the combination of claim 3 are found in appellant's devices except a packing member having a flange frictionally held in an internal groove of the sleeve.

Finding of Fact XII (T. R. 72) covers this determination by the trial court. Federal Rule of Civil Procedure No. 52 (a) provides that such findings shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. As heretofore discussed relative to commercial success of plaintiffs' commercial device of Exhibit 17, appellants' witness McDougall testifies (T. R. 227) that the radially outwardly extending rim of the packing of plaintiffs' device (Exhibit 17) and also the packing of defendants' devices (Exhibits 47 and 48), do not have flanges because they are V-shaped packings; yet in analyzing the Berry patent of the prior art (T. R. 190 and 321) he readily describes as a "flange" the ring member "L" which makes a *V-shaped connection* with the enlarged sleeve member D with an angle almost identical with a cross-section of defendants' packing gasket. Again (T. R. 205-206) the same witness testifies that defendants' devices (Exhibits 47 and 48) do not have an interior *annular* groove, because it is a bell end with a half round groove. He prepared the claims of the Pierce patent of Exhibit 22, according to which the exhibits 47 and 48 are claimed to be made; and in claim 1 of the Pierce pat-

ent that same witness described that groove as “an *annular* internal semi-circular section groove” (T. R. 305). Defendant’s witness Mr. Finkbeiner says of Exhibit 47, “That is an *annular* groove around there”, (T. R. 275). As to the flange on the packing member, it will be noted at Transcript of Record page 275 that *plaintiffs’* counsel in referring to defendants’ device (Exhibit 47) carefully avoided referring to the outer rim of defendants’ packing as a “flange”, but described the packing portions as the “inner” and “outer” portions, yet the defendants’ witness himself voluntarily adopts the term “flange” for those portions. Both witnesses when testifying for the purpose on which they were called as experts studiously maintain that if there is a V-shape or a U-shape, there is no flange, but when their testimony is casual and not studied, they both find no difficulty in saying a V-shaped connection provides a flange, and that defendants’ devices have an internal annular groove to hold that flange.

Eibel Process Co. v. Minnesota & Ontario Paper Co., 261 U. S. 45, 53; 67 L. Ed. 523, 528:

“A case that can be made out in all its elements by cross examination of opposing witnesses is a strong case. Implication of facts and conditions falling from the mouths of witnesses, when only collateral to the exact point of inquiry for which they are called, is generally the most trustworthy evidence, because the result of the natural, so to say, subconscious adherence to the truth, uninfluenced by a knowledge or perception of the bearing of the implication on the ultimate issue in the case.”

Defendants' witnesses contradict themselves and contradict each other.

The trial court was able to hear and see the witnesses, and on that basis determined as a fact that the radially extending rims of the packing members of the Lanninger patent and the defendants' devices, Exhibits 47 and 48, were "flanges" frictionally retained in a groove and that they operated in the same way to accomplish the same results by substantially similar means (T. R. 63 and 73). It is urged that the evidence amply supports the findings and that under Rule 52 (a) the findings should not be disturbed.

Reinharts, Inc. v. Caterpillar Tractor Co. (C. C. A 9), 85 Fed. (2d) 628.

The testimony of witnesses Vale (T. R. 120-125) and Hanson (T. R. 360-364) amply demonstrates that the packing member of Exhibits 47 and 48 operate in the same manner as is described in the Lanninger patent and that there is a flange frictionally retained in an internal annular groove of the sleeve. There is no denial of inclusion of any of the other elements of claim 3. The testimony of defendants' witness Mr. Pierce (T. R. 342-349), who manufactures the sleeve and packing for defendants, amply demonstrates that there is a tight fit between the rim or flange of the packing and the internal groove of the sleeve, to provide a seal and that the packing also permits flexibility. The defendants themselves attach the means to hingedly secure the sleeve on the unthreaded pipe end, comprising the lug and latch in Exhibit 48 and the notch and hook of Exhibit 47,

both of which secure the sleeve on the unthreaded pipe end and maintain them secured while still permitting the flexibility which Mr. Pierce built into the joint. The testimony by Mr. Finkbeiner (T. R. 273), endeavors to show that defendants' packing is not frictionally held in the groove because it is held by the shape of the groove with a reasonably tight fit. That is what the Lanninger patent says of the packing, that it is "held in a recess e"; that it is a "specially simple fixation as it is inserted and clamped in a groove"; but if it is optionally desired to make the clamping of the flange adjustable, the front wall and the rear wall of the groove may be relatively movable by means of threads p of Fig. 3. And Mr. Finkbeiner further says (T. R. 274), defendants' packing could not fall out because of the shape of the groove, and neither could Lanninger's fall out because it is "held in a recess e". Lanninger describes his fit as a clamped fit in the groove and he can optionally make the clamp adjustable, whereas, Mr. Finkbeiner (T. R. 274), and Mr. Pierce (T. R. 343, 344), say that the packing of defendants' devices (Exhibits 47, 48) are held in the groove and fit tightly and are purposely made so. They all provide flexibility and make a seal against leakage when water pressure is in the pipe line. In fact, Mr. Finkbeiner demonstrates with defendants' packing member (Exhibit 4), how, when the unthreaded pipe end is inserted (T. R. 288), the much vaunted "V" of defendants' packing is closed up from the bottom angle for three-quarters of the depth of the "V", and the closed portion of the "V" becomes a mere slit, or

as the Court expressed it, "just like overlapping lips pressed tightly against each other and then the whole against the groove" (T. R. 289).

This is a case where the defendants urge that every individual element and also the combination of the Lanninger patent is found in the prior art, but then discard the prior art devices and copy the Lanninger patent.

Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 441, 55 L. Ed. 527, 534:

"The prior art was open to the rubber company. That 'art was crowded', it says, 'with numerous prototypes and predecessors' of the Grant tire, and they, it is insisted, possessed all of the qualities which the dreams of experts attributed to the Grant tire. And yet the rubber company uses the Grant tire. It gives the tribute of its praise to the prior art; it gives the Grant tire the tribute of its imitation, as others have done."

Farmers Handy Wagon Co. v. Beaver Silo & Box Mfg. Co. (C. C. A. 7), 236 Fed. 731, 738:

"Appellee, having overlooked the silos of the prior art and openly appropriated that of the patent, must, by reason of its tribute implied in its almost literal annexation of the device, come somewhat limpingly to the contest against its validity. It certainly concedes its utility."

The functioning of defendants' coupling sleeve and packing are described in the catalogue of Mr. Pierce,

the manufacturer (Exhibit 56, page 1, exclusive of the cover page),

“It makes a permanently tight joint, which takes care of all expansion strains and being very flexible allows the pipe line to conform to the contour of the ground and variations of alignment.”

Lanninger says of his invention (Exhibit 11, T. R. 383, p. 1, lines 22-27),

“According to the invention this difficulty is overcome by using the elastic packings through which not only is a tight joint capable of being maintained but a certain degree of flexibility is imparted to the pipe line.”

and that his securing means is to

“further increase the flexibility of the joint of the pipes and the facility of this joint to adapt itself to the irregularities of the ground and the available space.”

These appraisals of the respective devices could almost be substituted one for the other.

Lanninger made a meritorius invention; defendants may have made changes in shapes of parts, and may call them by a different name, but they accomplish the same thing in the same way by substantially the same means and effectuated by the same materials operated by the same physical forces.

Winans v. Denmead, 15 How. 330, 342, 14 L. Ed. 717 at 722:

“And therefore, the patentee, having described his invention, and shown its principles, and

claimed it in that form which most perfectly embodies it, is, in contemplation of law, deemed to claim every form in which his invention may be copied * * *”

Winans v. Denmead not only has the respect due to its statement as “a familiar rule” by the Supreme Court in 1853, but it has been followed down the years and reiterated in various forms.

Sanitary Refrigerator Co. v. Winters (1929),
280 U. S. 30, 74 L. Ed. 147, 3 Pat. Q. 40:

“Authorities concur that the substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself; so that if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form or shape. (Citing cases.) That mere colorable departures from the patented device do not avoid infringement, see *McCormick v. Talcott*, 20 How. 402, 405, 15 L. Ed. 930, 931. A close copy which seeks to use the substance of the invention, and, although showing some change in form and position, uses substantially the same devices, performing precisely the same offices with no change in principle, constitutes an infringement. *Ives v. Hamilton*, 92 U. S. 426, 430, 23 L. Ed. 494, 495.”

While defendants have somewhat changed the form of the packing element as illustrated in the Lanninger patent, they have adopted the idea of means which is determinative of identity of principle.

Consolidated Safety Valve Co. v. Crosby etc.

Valve Co., 113 U. S. 157, 28 L. Ed. 939, 946:

“When the ideas necessary to success are made known, and a structure embodying those ideas is given to the world, it is easy for the skilful mechanic to vary the form, by mechanism which is equivalent and is, therefore, in a case of this kind, an infringement.”

Butler v. Burch Plow Co., 23 Fed. (2d) 15
(C.C.A. 9):

“Defendants therefore cannot escape infringement by adding to or taking from the patented device by changing its form, or even by making it somewhat more or less efficient, while they retain its principle and mode of operation and attain its results by the use of the same or equivalent mechanical means.”

See also:

Reinharts, Inc. v. Caterpillar Tractor Co. (C.C. A. 9), 85 Fed. (2d) 628, 632, 634, 636;

Parker v. Automatic Machine Co., 227 Fed. 449, 452 (No. Dist. Calif.).

CLAIM LANGUAGE NOT IGNORED BY TRIAL COURT.

At page 44 of appellants' brief at paragraph numbered "4", appellants urge that the trial Court ignored the language of claim 3. Lanninger could have as well designated his "flange" member as an integral outwardly extending rim or rib or a radially outwardly

extended collar. He would still have been within the common definition of a flange. But his specification and his drawings indicate clearly that his co-called "flange" is that portion of a packing member, regardless of its name, which holds the packing member in an interior annular groove in the sleeve and provides flexibility for an unthreaded pipe end inserted through a central opening in the packing. But the basis of appellants' whole theory of claim language is predicated on a false premise. Lanninger does not say in his specification nor in his claim that he employs a "flange packing". He says he uses an "elastic packing", a "packing cup", a "rubber cup", "a hat shaped rubber packing". Then he describes that element as having a "flange". It is believed that the previously cited decisions of the Supreme Court and of this Court amply support the findings of the trial Court that it is the function, purpose and mode of operation which determines similarity and infringement rather than the names or forms of things.

**DEFENDANTS' CLAIM THAT THEIR DEVICES ARE MADE
UNDER PIERCE PATENT No. 1,945,293.**

Defendants claimed that their devices of Exhibits 3, 8, 47 and 48 were manufactured and sold under Pierce Patent No. 1,945,293, granted January 30, 1934, applied for in 1931, eight years after the Lanninger application of 1923. The Pierce patent (Exhibit 22) does not disclose a word as to providing a flexible

joint, and the closeness of the inserted pipe end 9 to the interior wall of the casing as shown adjacent the numeral "8a" indicates that no flexibility was intended, but merely a sealing gasket in a closely fitted joint.

But it is well settled that a later patent does not authorize the later inventor and later patentee to infringe the earlier patent of an earlier inventor.

Sanitary Refrigerator Co. v. Winters, 280 U. S. 30, 74 L. Ed. 147;

Temco Elec. Motor Co. v. Apco Mfg. Co., 275 U. S. 319, 72 L. Ed. 298;

Simplex Window Co. v. Hauser R. W. Co., 248 Fed. 919 (C.C.A. 9);

Bake-Rite Mfg. Co. v. Tomlinson, 16 Fed. (2d) 556 (C.C.A. 9).

CONCLUSION.

It is again urged that Lanninger was a pioneer in the inventive concept of providing a flexible leak-proof joint in a line of rigid pipe and produced a meritorious invention; that he reduced it to practice by a novel combination of elements; that the utility of his invention is demonstrated by both commercial success and imitation by appellants; that there is nothing in the prior art which even resembles it in concept or structure, and that the appellants have infringed claim 3 by a substantial duplication of both concept and means; that the findings and conclusions of the trial

Court should not be disturbed, and that the interlocutory decree should be affirmed.

Dated, August 9, 1943.

Respectfully submitted,

GEISLER AND GEISLER,

THEO. J. GEISLER,

L. R. GEISLER,

WM. S. GRAHAM,

Attorneys for Appellee,

California Corrugated Culvert Co.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

SAM SCHNITZER, HARRY J. WOLF, ROSE
SCHNITZER and JENNIE WOLF individu-
ally, and as a co-partnership doing business
under the name and style of ALASKA
JUNK CO.,

Appellants,

vs.

CALIFORNIA CORRUGATED CULVERT
CO., a corporation, and LEO T. CROWLEY,
Alien Property Custodian of the United
States,

Appellees.

APPELLANTS' REPLY BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

J. S. MIDDLETON,
1035 Pacific Building,
Portland, Oregon,
Attorney for Appellants.

WILLIAM S. GRAHAM,
111 Sutter Street,
San Francisco, California,

T. J. GEISLER,

L. R. GEISLER,

Platt Building,
Portland, Oregon,

CARL DONAUGH, United States District Attorney
for the District of Oregon,

J. H. HAZLETT, his Deputy,
United States Court Building,
Portland, Oregon,

Attorneys for Appellees.

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PAUL P. O'BRIEN

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INDEX

	Page
Errata	1
The Basis of Appellees' Position.....	1
The Invention Described in Lanninger Patent...	4
The Quality of Invention.....	4
The Disclosure and Claim in Suit.....	6
Claim 3 is a Valid Combination.....	7
Lanninger's New Use of Flexible Joints.....	7
Cooperation of Elements of the Combination.....	8
Simplicity Does Not Negative Invention.....	8
Commercial Success	9
Plaintiffs' Commercial Device of Exhibit 17 is Made According to the Lanninger Disclosure..	10
Prior Art Neither Negatives Validity nor Narrows Claim 3	11
Specification I—Flexible Hose Couplings Are Non-analogous Art	13
Lanninger Patent Entitled to Liberal Construc- tion	15
Specification III—File Wrapper of Lanninger Patent	16
Infringement	16
Defendants' Claim That Their Devices are Made Under Pierce Patent No. 1,945,293.....	19
Matters Not Discussed.....	19
Claim Language Not Ignored by Trial Court....	20

TABLE OF CASES

	Page
Bingham Pump Company, Inc. v. Leonard L. Edwards 118 Fed. 2nd 338, 340.....	14
Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U.S. 399, 414, 49 L. Ed. 1100.....	11, 19
Eibel Process Co. v. Minnesota & Ontario Paper Co., 261 U.S. 45, 67 L. Ed. 523, 534.....	8
Electric Signal v. Hall Co., 114 U.S. 87, 96, 29 L. Ed. 96	11, 19
Elvin Mechanical Stoker Co. v. Locomotive Stoker Co., 286 Fed. 309, 311 (C.C.A. 3, 1923).....	9, 15
Ford Motor Co. vs. Parks & Bohne, 21 Fed. 2nd 943, (C.C.A. 8, 1927)	15
Fulton Co. v. Powers Regulator Co., 263 Fed. 578-580 (C.C.A. 2, 1929)	3
H. K. Regar & Sons, Inc. v. Scott & Williams, Inc., 63 Fed. 2d 229, 231.....	7
Payne Furnace & Supply Co., Inc. v. Williams-Wallace Co., 117 Fed. 2d 823, 825 (C.C.A. 9, 1941)	6, 8
Pyrene Mfg. Co. v. Boyce, 292 Fed. 480, 481.....	4
Richmond Screw Anchor Co. v. U. S., 275 U.S. 331, 72 L. Ed. 303	5, 6, 15
Samuel B. Smith v. E. H. Snow, et al., 294 U.S. 1, 20, 79 L. Ed. 721, 732.....	6
Sanitary Refrigerator Co. v. Winters, 280 U.S. 30, 41-43, 74 L. Ed. 147.....	11
United States v. Dubilier Condenser Corp., 289 U. S. 178, 77 L. Ed. 1114, 1119.....	5
Wire Tie Mach. Co. v. Pacific Box Corp., 102 Fed. (2d) 543, 556 (C.C.A. 9, 1939).....	15

REFERENCE WORKS

Webster's Unabridged Dictionary (G. & C. Merriam, 1918)	15
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ally, and as a co-partnership doing business
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States,

Appellees.

APPELLANTS' REPLY BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

ERRATA

Before proceeding with the reply brief appellants call to the attention of the Court two errors appearing in the appellants' original printed brief.

At page 29, in the incomplete paragraph at the top of the page, Exhibit 17 is twice referred to. The first reference is correct, but the second reference should be to Exhibit 70 instead of to Exhibit 17.

At page 47, the third from the last line in the second full paragraph on the page commences with the word "pellees". The correct reference is "pellants". The word "appellants" in the next following line should be "appellees'.

THE BASIS OF APPELLEES' POSITION

Turning now to an analysis of the matters discussed in the appellees' answering brief, there is first called to the attention of the Court the following, quoted from pages 28 and 29:

"Now, of course, plaintiffs do not contend that Laninger was the first to recognize the problem of conveying water in pipes over irregular ground, since that has been done for centuries; nor of the bell and spigot joint, nor of a hinged connection of pipes, nor of a flanged packing; nor of a means to secure pipe together. * * * He knew, as had been known for centuries, that water required pressure to flow upwardly against the force of gravity and that irregular ground had upward inclines as well as downward inclines. * * * And he recognized that he must overcome that pressure and prevent the pipes from blowing apart,

without destroying the other factors for solving his problem.”

Interspersed with the foregoing, are certain statements of what Lanninger did in the premises; and the summation of the statement is (page 29 appellees' brief) :

“It was this new idea of possibilities, this new conception of utilizing irregular ground under portable artificial irrigation and the application of the remedy, for which Lanninger, like Eibel, was entitled to be rewarded in his patent.”

The attention of the Court is particularly directed to the above quoted language which discloses three outstanding facts, all to be borne in mind at all times in an analysis of appellees' answering brief. These facts are:

1. Appellees concede that all of the component parts of the combination disclosed in claim 3 of the patent in suit are old; and

2. The problem to be considered by the patentee was old; and

3. The appellees seek as a part of their attempt to sustain the validity of claim 3 of the patent in suit, to patent the use or result of the combination in addition to and as a part of the combination itself, without, in so doing, being restricted to the use of the elements named in the combination claim of the patent in suit.

This, of course, they may not do, for use and result are not patentable. The protection of the patent resides in the claims alone, and is co-extensive therewith.

“Strictly speaking infringement of a patent is an erroneous phrase; what is infringed is a claim, which is the definition of the invention and it is the claim which is the cause of action. One may appropriate many of the ideas or concepts suggested by specification or drawing, but it is the claim that measures both the patented invention and the infringement thereof. This rule obtains whether the patent be properly spoken of as great, or small, primary or secondary.” *Fulton Co. v. Powers Regulator Co.*, 263 Fed. 578-580 C.C.A. 2, 1920.

“A patentee may describe something that he does not claim or claim that which he has not described; his grant of privilege is construed to cover only that which is both described and claimed no matter how broad the claim-language may be. * * * so that a patent (i e., a claim) can never be given a construction broader than its terms in order to cover something which might have been claimed but was not.” *Fulton Co. vs. Powers Regulator Co.*, 263 Fed. 578-580, (C.C.A. 2—1920)

It will be observed that the third of the above stated elements is made the subject matter of the appellees’ “*Further Statement of the Case*” appearing on pages 3 and 4 of appellees’ brief; and so, at the outset, we find the appellees endeavoring to interject the issues of use and function as elements of the patented combination; and such issues are, of course, wholly improper. This interjection appears at various places in appellees’ brief, but space will forbid repeated reference to the various instances as they occur.

THE INVENTION DESCRIBED IN LANNINGER PATENT

Under this heading the appellees discuss this subject. They, however, ignore the quoted matter on page 5 pertaining to the "very strong vertical flange" and "the flange of the packing is held in a recess", exact details of the patent application unfavorable to appellees, and on page 6 endeavor to minimize the "clamping" feature of Lanninger's construction as it pertains to the retention of his flanged packing, terming the "clamping" feature an alternative or optional form only, whereas in fact, in his first application to the patent office (page numbered 1, Exhibit 45) Lanninger termed the "clamping" feature one of the "salient" features of his invention and, in five of the six claims of the patent, the clamping of the flange is provided for. Appellees' attempted analysis of the patentee's "invention" reaches a result opposite to the exact language of the patentee's patent application and five of the six claims of his patent.

THE QUALITY OF INVENTION

Here appellees cite *Pyrene Mfg. Co. v. Boyce*, 292 Fed. 480, 481. The definition of "invention" laid down by the Court in this case must be read in the light of the facts disclosed by the opinion; for those facts the Court had in mind in laying down its definition. And the facts were that the restricted and selected location of the device in the radiator was the cause and reason for its success as contrasted with the restricted form of the Lanninger packing here in issue which

negatived the commercial success of the Lanninger "invention". Under the facts here present, neither the novelty nor utility mentioned in the Court's definition of invention in the cited case is present; and the definition is therefore not here applicable.

In *U. S. v. Dubilier Condenser Corp.*, 289 U.S. 178, 77 L. Ed. 1114, 1119, the question before the Court was not patent infringement, but an attempt to secure ownership in the government as beneficiary in trust, of certain patents. Definition by the Court of "invention" was, therefore, incidental only to determination of the actual issues. And the definition quoted on page 8 of appellees' brief must be read in the light of language immediately preceding the quotation, as follows:

"The reluctance of courts * * * is due to a recognition of the peculiar nature of the act of invention which consists neither in finding out the laws of nature nor in fruitful research; as to the operation of natural laws but in discovering how those laws may be utilized or applied for some beneficial purpose by a process, a device or a machine."

The Court did not endeavor to say how much of its definition of "invention" is patentable invention.

Appellees quote from *Richmond Screw Anchor Co. v. U. S.*, 275 U.S. 331, 72 L. Ed. 303. We also quote from the opinion in that case. Appellees claim that claim 3 of the patent in suit is to be construed to include packings other than the flanged packing disclosed by the patentee.

"The patent was a combination patent and in view of the prior art was limited to the exact terms of the claims which made it quite narrow as its

course through the patent office clearly demonstrated.”

Further, it may be observed that in this case the invention in the form described by the patentee received general acceptance in use as distinguished from the case at bar wherein the patentee's disclosures have never been reduced to practice commercially.

THE DISCLOSURE AND CLAIM IN SUIT

The language of the Court in *Samuel B. Smith v. E. H. Snow, et al.*, 294 U.S. 1, 20, 79 L. Ed. 721, 732, is appellants' conception of the law, particularly with reference to the quotation

“* * * since the claims of the patent not its specifications measure the invention”

when it is remembered that this Court has said in *Payne Furnace & Supply Co., Inc. v. Williams-Wallace Co.*, 117 Fed. (2d) 823, 825 (C.C.A. 9, 1941)

“The claims of a patent are to be understood and interpreted in the light of its specifications” (Citing authorities),

and when one remembers also the language of the United States Supreme Court in *Richmond Screw Anchor Co. v. U. S.*, supra. It becomes obvious that the disclosure and claim in suit cannot be construed as infringed by the accused devices for the reason that the latter do not employ one of the essential elements of the combination of the claim in suit, the flanged packing.

CLAIM 3 IS A VALID COMBINATION

This matter has already been discussed in Specification II of appellants' brief.

LANNINGER'S NEW USE OF FLEXIBLE JOINTS

Appellees' discussion here again is predicated upon use as an element of patentability. They ignore the obvious fact that the structure of Berry (Exhibit 36, page 413, et seq. Tr.) could as well be used for the same purpose, for which indeed Berry's specifications (lines 11 to 26, inclusive, page 417 Tr.) expressly fit it. Appellees discuss the "releasably secured flexibility" of the Lanninger device. Berry also shows a coupling releasably secured, perhaps not so readily as Lanninger's, though that is matter of degree; but claim 3 in suit says nothing about releasably securing means and does speak of *hingedly* securing means which Berry discloses also. Following now the further language of the Court in *H. K. Regar & Sons, Inc. v. Scott & Williams, Inc.*, 63 Fed. (2d) 229, 231, we find

"But a new use of an old thing or an old process, quite unchanged, can under no circumstances be patentable; not because it may not take as much inventiveness to discover it as though some trivial change were necessary but because the statute allows patents only for a new 'art, machine, manufacture or composition of matter' (Section 31, Title 35, U. S. Code—35 U.S.C.A. Section 31) The test is objective; mere discovery will not do. In the case at bar it is indeed hard to find even a new use; perhaps it would be more accurate to speak of a use for what had theretofore been thought useless * * *."

The same thing may be said of the use of the flexible pipe coupler for irrigation although, unfortunately, not of the Lanninger pipe coupler because that has never been used.

COOPERATION OF ELEMENTS OF COMBINATION

It is stated (page 16 appellees' brief) that the appellants "complete the combination of the claim by attaching the respective hook and latching lock" mentioned, which statement is, of course, incorrect for the reason that the appellants do not use the flanged packing. In *Payne Furnace & Supply Co. v. Williams-Wallace Co.*, 117 Fed. (2d) 823, cited in this discussion, aggregation was not urged, on the face of the Court's opinion.

SIMPLICITY DOES NOT NEGATIVE INVENTION

In this discussion it is stated

"A part of Lanninger's inventive concept lay in the fact that he recognized the existence of a problem
* * *"

As pointed out at the beginning of this brief, the appellees expressly admit that the problem had been recognized generally for centuries. The conclusion arrived at by the Court in *Eibel Process Co. v. Minnesota & Ontario Paper Co.*, 261 U.S. 45, 67 L. Ed. 523, 534, is not here in point, for the reason that Eibel solved his problem and his solution was accepted com-

mercially, whereas Lanninger's solution was not so accepted. The other cases cited do not here apply for the same reason; and the combination of claim 3 of the patent in suit involving as one of its integral parts and "salient" features the flanged packing has not been made at all for commercial use.

COMMERCIAL SUCCESS

Under this heading, appellees admit departure from the "exact form" of the Lanninger drawings in order to facilitate economical manufacture in quantity of devices like Exhibit 17 and "so that the device may be galvanized against rusting, and the hot galvanizing drained from the sleeve and not fill the interior groove." All four reasons are excellent reasons why the Lanninger device was not a commercial success; and they are also reasons why Lanninger's "flange" packing is absent from Exhibit 17 and the commercial devices corresponding thereto; and they are reasons why its mode of operation is not the same as Exhibit 70, though this sameness is stated on page 30, appellees' brief to be the fact. One must revert once more to the language of the Court in *Elvin Mechanical Stoker Co. v. Locomotive Stoker Co.*, 286 Fed. 309, 311, C.C.A. 3, 1923, cited in appellants' original brief herein:

"declining to construe his claims in any broad way to cover other devices whose commercial success in the art lies, *not in the fact that they adopted his disclosures but that they departed from them.*"

PLAINTIFFS' COMMERCIAL DEVICE OF EXHIBIT 17 IS MADE ACCORDING TO THE LANNINGER DISCLOSURE

Here we have an attempt by appellees to play upon words and to make the definition in Knight's Mechanical Dictionary (Exhibit 96) cover anything and everything having any sort of a rim and make it a "flange" packing, despite the fact that in his patent application (Exhibit 45) Lanninger termed his "flange" packing both by that name and its alternate trade name of a "hat" packing, fully identifying it by both of its trade names and distinguishing it from the "U" packing of Anderson, saying:

"(Letter of February 12, 1929, Exhibit 45) Furthermore he does not show a packing having a flange clamped in the sleeve and the free portion extending into the sleeve and frictionally engaging the unthreaded end of the pipe * * * claims 12 and 13 are generic * * * for while claim 13 defines the sleeve as being formed with the groove frictionally retaining the flange of the packing, claim 12 defines the sleeve as including means for clamping the flange in the sleeve * * *"

and also identifying it exactly in all of the patent drawings.

Assault is made upon the testimony of the witness McDougall. Again a play upon words. The witness did speak of metallic flanges and he also correctly adhered to the trade and recognized name of the "flange" packing. At page 33, having reached the conclusion that Mr. McDougall bears out the appellees in their contention, the appellees next state

“but it is not its name but what it does which is the determining factor.”

Of course, if this were true, the appellees' cause would be enhanced. But the case cited, Sanitary Refrigerator Co. v. Winters, 280 U.S. 30, 41-43, 74 L. Ed. 147, lays down another requirement which is that the two devices “do the same work in *substantially the same way*”. See also, Electric Signal v. Hall Co., 114 U.S. 87, 96, 29 L. Ed. 96, and Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U.S. 399, 414, 49 L. Ed. 1100, and quotations therefrom, page 19 of this brief. As fully developed in the discussions at pages 38 and 39, appellants' brief herein, Lanninger's “flange” packing and the “U” packing of the accused devices do not operate in the same way.

The testimony of Mr. Finkbeiner is attacked (pages 32 and 33 appellees' brief) on the theory that he recognizes “inside flanges” and “outside flanges”. He does recognize what counsel for the appellees is talking about in this connection (page 275, Tr.) but on page 276 it appears that the witness is talking about Exhibit 6, the Lanninger gasket, which does have a flange; and apparently this discussion goes back at least to the first answer on page 276.

PRIOR ART NEITHER NEGATIVES VALIDITY NOR NARROWS CLAIM 3

The Jones patent, here referred to, does not mention flexibility; neither does it mention rigidity and, of course, Jones was entitled to its protection in all of

its manifestations, flexible or rigid. Obviously, if flexibility were desired, all that is required is a loose fit of the parts, to provide in the same way the same flexibility that Lanninger accomplishes. If made with loose fitting parts to permit flexibility, the means for hingedly securing the portions together is present. Appellees point out that there is no need for flexibility in the joint because the flexibility is present in the hose. It remains only, on this point, to consider the couplings of air hoses between all railroad cars, old and familiar to all of us, wherein the coupling is expressly made to function and does function to permit a free movement of the coupling joint in coupling up in use, thereby relieving wear on the hose. Perhaps not so well known, but equally old, are the ball and socket joints used on large wire wound hoses for the unwatering of ships in salvage work, again where it is preferred that the joint provide flexibility to avoid wear on the hose. Appellees' contention of non-analogy fails.

In the discussion of the Berry patent (pages 36 and 37, appellees' brief) the point is made that the joints are "permanently and mechanically connected". The Berry patent (Exhibit 36) discloses flexibility of the joint and locking means, hinged in character. The element of permanence of connection of the locking means is not discussed as it is not discussed in claim 3 of the patent in suit. No limitation on the "permanence" of the locking means is laid down in either case in the claim; and both are of course, mechanically connected. It is endeavored to distinguish between the

“clamped” flange of the packing in the Berry patent and “frictional retention”. Yet further down on page 37 it is stated, and correctly, that a clamp is one form of frictional holding. And it is stated that at pages 30 and 32 of appellants’ brief a distinction between the two means is drawn. We look in vain for such a distinction in appellants’ brief at the pages mentioned or elsewhere other than as Lanninger, in the quoted portions of the file wrapper and contents (pages 32, 33) and in the claims of his patent made such a distinction and as that distinction has been later commented upon, in development of Lanninger’s actual claimed ideas. The distinction is the distinction of Lanninger, not of these appellants, though comment by these appellants on Lanninger’s views and the views of the appellees has been necessary.

Appellees’ discussion of the prior art patents other than Berry and Jones receives no comment here, other than that the other prior art patents show generally utilization in pipe connections of one type or another of the various component parts of the Lanninger structure. Nothing is claimed for these patents, other than Berry and Jones, as anticipation.

SPECIFICATION I—FLEXIBLE HOSE COUPLINGS ARE NON-ANALOGOUS ART

This matter has been briefly covered under the heading “Prior Art Neither Negatives Validity nor Narrows Claim 3”, *supra*. It being shown that the coupling of hoses by flexible joints is on occasion a

necessary and practical expedient, it is believed that the analogy is established. However, to consider the matter clearly, and to dispose of any question arising from the language of the cited authorities:

Assume that prior to the application for the Lanninger patent, a patent had issued for the coupling of hoses, disclosing in combination, in the words of claim 3 of the patent, in suit, except for the substitution of the word "hose" for the word "pipe" wherever the latter appears in the claim, the identical structure claimed in claim 3 of the patent in suit, but with specifications explaining and extolling the virtues of the invention for use in connection with hoses to prevent the wear, straining, and breaking thereof adjacent to their ends. Can it be for one moment assumed that in the face of such a structure, and such claims, patent would have issued to Lanninger? To envision such a result, one must also assume the patenting of use or function. This Court has ruled in *Bingham Pump Company vs. Leonard L. Edwards*, 118 Fed. 2d, 338, 340:

"It is clear that Appel did not conceive of the use of his device as appellee conceives his. However, if Appel's device can be used for the same purpose, it is immaterial whether he conceived of that use. * * * Therefore, the fact that Appel did not know that his device could be used for the same purpose as appellee's device does not preclude the defense of anticipation."

It is obvious that most hose couplings could be used on pipe, and vice versa. Couplings made to the disclosures of the claim in suit might quite evidently be used, if desired, on hose. It is reiterated that the arts of coupling pipe and hose are analogous.

From Webster's Unabridged Dictionary (G. & C. Merriam, 1918) the following definitions are quoted:

Conduit—An artificial channel, as a pipe—for conveying water or a fluid.

Hose—A flexible pipe, as of leather or India rubber for conveying fluids, especially water.

Pipe—Any long tube or hollow body, of wood, metal, earthenware, or the like as to conduct water, steam, etc.

Tube—A hollow cylinder of any material.

In *Ford Motor Co. v. Parks & Bohne*, 21 Fed. 2nd 943 (C.C.A. 8, 1927), the Court says:

“The application of an old device to a new use is not in itself an invention or capable of protection by a patent * * * It is only when the new use is so reconдите and remote from that to which the old device has been applied, or for which it was conceived, that its application to the new use would not occur to the mind of the ordinary mechanic, skilled in the art, seeking to devise means to perform the desired function, with the old machine or combination present before him, that his conception rises to the dignity of invention.”

LANNINGER PATENT ENTITLED TO LIBERAL CONSTRUCTION

The law on this point, stated in *Elvin Mechanical Stoker Co. v. Locomotive Stoker Co.*, 283 Fed. 309 (311) C.C.A. 3, 1923, quoted at pages 29 and 30, appellants' brief herein, also laid down by this Court in *Wire Tie Mach. Co. v. Pacific Box Corp.*, 102 Fed. (2d) 543, 556, C.C.A. 9, 1939, and as stated in the decisions quoted and cited under Specification III of appellants' brief, and as succinctly stated in *Richmond Screw Anchor Co. v. U. S.*, 275 U.S. 331, 72 L. Ed. 303,

“The patent was a combination patent, and in view of the prior art was limited to the exact terms of the claims which made it quite narrow as its course through the patent office clearly demonstrated”

is settled. The decisions cited by appellees do not change the above enunciated rules.

SPECIFICATION III—FILE WRAPPER OF LANNINGER PATENT

This matter has been discussed, pages 30 and subsequent of appellants' brief. Lack of space and desire to avoid repetition forbids a re-examination of the subject, though the fact is called to the attention of the Court that at the top of page 52, Appellees' Brief, it is endeavored, because of a comma, to change the meaning of the patentee's language to mean that which he did not mean, and further down on the page the mechanical clamp is minimized whereas it seems to have been Lanninger's first and primary conception. This matter will be left to the Court's construction of the patentee's English in the light of the discussion originally presented by appellants commencing at page 30 of their brief, and without further comment.

INFRINGEMENT

At page 58, appellees' brief, the testimony of the witness Finkbeiner is again assailed. Again, a word is seized upon to change or confuse a meaning. Continuing from page 276 to 290, Tr., counsel for the appellants endeavors to induce the same witness to concede

that all packings, in substance, are flange packings; and the witness, under a searching examination, makes his position quite plain. If his whole testimony be read, there will be found no variation from his fundamental and correct assertion of the facts.

On page 59, Mr. Pierce is quoted at pages 342-349, Tr. as establishing that there is a tight fit between the packing in the accused device and the internal groove in the sleeve. A reading of the testimony of Mr. Pierce will disclose that it is not necessary that the packing member of the accused devices fit tightly in the groove (page 342 Tr.); that the packings are sometimes tight and sometimes loose (pages 342 and 343 Tr.); and generally, from the remainder of his testimony, that they work as well in either case. This statement in appellees' brief is therefore incorrect. And on page 60, it is urged that Mr. Finkbeiner's testimony to the effect that the packing of the accused devices is not frictionally held in the groove, is incorrect. It is sought, farther on on this page, to make Finkbeiner's testimony show that the retention of the packing of the accused devices in the groove of the sleeve by their size and shape is synonymous with Lanninger's "frictional retention". On this point, it will be recalled that the appellees' witness Vale, speaking of the retention of the Lanninger packing in the groove, says (page 115 Tr.):

"It is *wedged* up in there and the connection of the wedge is frictional."

The witness McDougall confirms this (page 222, Tr.).

Let the Court take in hand Exhibit 81, a sectioned

model of the accused device less only the locking means. Endeavor to push or wedge the sectioned packing as tightly as may be into the annular groove. Hold the exhibit in the hand with the sectioned packing upward, and it will, of course, drop of its own weight. If the small section be used, it will fall out. If the larger section be used, it will collapse until its bulk holds it. Obviously, it is its shape and size which causes its retention. A similar section of the packing, Exhibits 70 or 49, on the other hand, "wedged into the groove", as Mr. Vale says, will not fall out or collapse. The wedging action and the frictional retention serve to prevent it. A simple demonstration, but convincing of the difference in the two instrumentalities. The appellants have not merely changed the form of the packing element, but they have entirely departed from the principle of operation of the original Lanninger device so far as the operation of the packing is concerned. They depend upon bulk and shape instead of wedging action or frictional retention or clamping means in holding the packing within the annular groove; and as pointed out in appellants' brief they depend in the mode of operation of the packing in the accused devices upon hydraulic pressure upon *both* lips thereof, whereas, the Lanninger gasket or packing depends upon mechanical wedging or clamping action to seal the flange and effect retention of the gasket and upon hydraulic pressure for sealing on the free end *only*. Very obviously, too, the packing in the accused devices, because of its shape, can be neither clamped nor wedged so that neither of Lanninger's methods of retaining it in the groove is possible of application.

“To constitute identity of invention, and, therefore, infringement, not only must the result attained be the same, but in case the means used for its attainment is a combination of known elements, the elements combined in both cases must be the same”. *Electric Signal v. Hall Co.*, 114 U.S. 87, 96, 29 L. Ed. 96.

“If the device of the respondents shows a substantially different mode of operation, even though the result of the operation of the machine remains the same, infringement is avoided.” *Cimiotti Unhairing Co. v. American Fur Refining Co.*, 198 U. S. 399, 414, 49 L. Ed. 1100.

DEFENDANTS' CLAIM THAT THEIR DEVICES ARE MADE UNDER PIERCE PATENT

No. 1,945,293

Here appellees claim that because the Pierce patent does not claim a flexible joint, no flexibility was intended. It is sufficient to say that, as pointed out by the appellees in their brief (page 54) the patentee was entitled to his invention in all of its forms, which certainly included the joint made loosely as well as tightly. So far, appellees' contention is at once disposed of; but as to the second matter raised under this heading, no claim is made contrary to the well settled principle of law, that a later patent does not authorize the later patentee to infringe the claims of an earlier patent.

MATTERS NOT DISCUSSED

Several other points, mentioned in the answering brief of the appellees, and not herein analyzed, are not discussed herein owing to the limitations of space.

CLAIM LANGUAGE NOT IGNORED BY TRIAL COURT

Again, in appellees' brief on this subject, we have a play upon words. Lanninger defined his packing by both of its trade names, differentiated it from the "U" packing, and showed the necessary means, preferably by clamping, but also by the frictional or wedging method, of sealing his flange and retaining it in the groove of the coupling. Now it is sought, by reason of the very wide and general definition of a "flange" contained in the dictionary, to depart entirely from the characteristic packing expressly taught by Lanninger in his application to the patent office, the descriptions contained in his specifications, and the teachings of his patent drawings and the express language of his claims, and to make his claims extend to and include all forms of packing having in any sense a "rim" or so-called "flange". The use, in combination, of the precise structure known to the art as a "flange" packing or a "hat" packing, which was one of the salient features of the patentee's concept is to be forgotten, and the appellees are to be given a monopoly on that which the patentee did *not* conceive, invent, or claim, but from which he expressly distinguished. It is respectfully submitted that claim language, substantiated as it is in this case by both patent office record and specifications, may not be so ignored.

Respectfully submitted,

J. S. MIDDLETON,

Attorney for Appellants.

No. 10342

United States
Circuit Court of Appeals
For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
POLSON LOGGING COMPANY,
Respondent.

Transcript of Record

Upon Petition for Enforcement of an Order of the National
Labor Relations Board

FILED

MAR 30 1943

PAUL P. O'BRIEN,
CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Amended Charge	3
Answer to Complaint	9
Certificate of the National Labor Relations Board	467
Charge	1
Charge, Amended	3
Complaint	4
Decision and Order	44
Conclusions of Law	72
Findings of Fact	48
Order	73
Exceptions to Intermediate Report and Rec- ord, Respondent's	40
Intermediate Report	12
Conclusions of Law	36
Findings of Fact	14
Recommendations	36
Order to Show Cause	80
Marshal's Return	81

	Index	Page
Petition for Enforcement of an Order of the National Labor Relations Board.....		75
Statement of Points (National Labor Relations Board)		470
Statement of Points (Respondent's)		472
Stipulation re Board's Exhibit No. 12		471
Testimony		82
Exhibits for National Labor Relations Board:		
2—Stipulation of Facts		83
3—Letter dated May 29, 1940, ad- dressed to Dave Lytle, Chairman, B.R.T. and Sam Key, Chairman, B.L.F. & E., Grievance Committees		93
4—Letter addressed to Arnold Polson, Gen. Mgr., Polson Logging Co. en- closing Agreement with the Chair- men and Secretaries of the General Grievance Committees of the B.R.T. and B.L.F. & E.		95
5—Separation Report, May 21, 1940, Clayton Reece		131
6—Separation Report, May 21, 1940, Dave Lytle		133
7—Notice to Employees, August 14, 1935		191

Index

Page

Exhibits for National Labor Relations
Board (Continued):

- 8—Notice dated Feb. 11, 1937, signed
Polson Logging Co. giving Basis
for Resuming Operations 193
- 9—Memorandum of Agreement, Polson
Logging Co. and Local No. 2, I. W.
of A. 134
- 12—Map showing Territory in which
the Company operates and the Lo-
cation of the Camps and Railroads. 399
- Stipulation re 471

Exhibits for Respondent:

- 1—Loggers' Safety Standards evolved
by the Department of Labor and In-
dustries for the State of Washing-
ton 344
- 2—(Rejected)—Statement of W. J.
Williams and Nels Hill re J. Morley
Stearns, Deceased 279

Witnesses for the National Labor Relations
Board:

- Brant, Lawrence
- direct 281
- redirect 283

	Index	Page
Witnesses for the National Labor Relations Board (Continued):		
Corrigan, T. C.		
—direct	238
—cross	244
—recross	246
—redirect	247
Groves, C. B.		
—direct	216
—cross	219
—redirect	225
—recalled, recross	312
Harlan, John		
—direct	260
Hill, Nels		
—direct	265
—cross	272
—redirect	280, 281
—recross	281
Key, Sam		
—direct	254
—cross	258
—redirect	259

Index

Page

Witnesses for the National Labor Relations Board (Continued):

Lytle, Dave	
—direct	135
—cross	160, 194
—recalled, cross	299
—redirect	300, 310
—recross	308
—recalled, direct	442
—cross	448
—redirect	449
Pauly, Paul	
—direct	248
—cross	251
—redirect	253
Plesha, Tony	
—direct	310
—cross	312
Polson, F. A.	
—direct	86
Reece, Clayton	
—direct	286
—cross	296
—recalled, direct	450
—cross	452

	Index	Page
Witnesses for the National Labor Relations Board (Continued):		
Thomas, Wirt		
—direct	460
—cross	464
—redirect	466
Wicklund, John		
—direct	229
—cross	230
—redirect	234, 236
—recross	235, 237
Williams, W. J.		
—direct	455
—cross	458
Wood, Earl		
—direct	179
—cross	182
—redirect	186, 189
—recross	187
Witnesses for Respondent:		
Ellingson, Bennett		
—direct	368
—cross	389
Golick, R. R.		
—direct	419
—cross	423

Index

Page

Witnesses for Respondent (Continued):

Groseclose, George	
—direct	427
—cross	431
Heck, Kalis	
—direct	438
Landi, Frank	
—direct	416
Polson, A. M.	
—direct	351
—cross	361
—redirect	364, 367
—recross	365
Polson, Arnold	
—direct	316
—cross	330
—redirect	342
—recross	349

United States of America
Before The National Labor Relations Board
19th Region

Case No. XIX- -685

Date filed July 8, 1940

In the Matter of

POLSON LOGGING COMPANY and
OZETTE RAILWAY COMPANY

and

BROTHERHOOD OF RAILROAD TRAINMEN
CHARGE

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that the Polson Logging Company and Ozette Railway Company at Hoquiam, Washington, has engaged in and is engaging in unfair labor practices within the meaning of Section 2, subsections (1) and (3) of said Act, in that

On or about the date hereinafter specified, it, by its officers, agents, and employees, terminated the employment of:

Name of Employee	Name of Job	Date Employment Terminated
Dave Lytle	Conductor	May 21, 1940
Clayton Reece	Brakeman	May 21, 1940

because of their membership and activities in behalf of the Brotherhood of Railroad Trainmen, a labor organization, and at all times since such date

it has refused and does now refuse to employ the above named employees, in violation of Section 8, subdivision (3), of said Act.

By the acts set forth in the paragraph above, and by other acts and statements, it, by its officers, agents and employees interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the said Act, in violation of Section 8, subdivision (1) of said Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the name and official position of the person acting for the organization.)

**BROTHERHOOD OF RAIL-
ROAD TRAINMEN**

820 Superior Ave. W.,
Cleveland, Ohio

By S. C. PHILLIPS,

Representing Brotherhood of
Railroad Trainmen.

Subscribed and sworn to before me this 6th day
of July, 1940 At Seattle, Wash.

/s/ ELWYN J. EAGEN

Regional Director

[Title of Board and Cause.]

Case No. XIX-C-685

Date filed July 8, 1940.

Date Amended Jun. 30, 1941.

AMENDED CHARGE

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that Polson Logging Company, Hoquiam, Washington, has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsections (1) and (3) of said Act, in that on or about the date hereinafter specified, it, by its officers, agents, and employees, terminated the employment of:

Name of Employee	Name of Job	Date Employment Terminated
Dave Lytle	Conductor	May 21, 1940
Clayton Reece	Brakeman	May 21, 1940

because of their membership and activities in behalf of the Brotherhood of Railroad Trainmen, a labor organization, and at all time since that date it has refused and does now refuse to employ the above named employees, in violation of Section 8, subdivision (3), of said Act.

By the acts set forth in the paragraph above, and by other acts and statements, it, by its officers, agents and employees interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the said Act, in violation of Section 8, subdivision (1) of said Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the name and official position of the person acting for the organization.)

BROTHERHOOD OF RAIL-
ROAD TRAINMEN

820 Superior Ave. W.,
Cleveland, Ohio.

By C. W. STEVENS,

Deputy President

43 Rose Friend Apts.,
Portland, Oregon.

Subscribed and sworn to before me this 28 day
of June, 1941 At Portland, Oregon.

[Seal] E. SETTLEMIER

Commission expires 1/26/45.

[Title of Board and Cause.]

COMPLAINT

It having been charged by the Brotherhood of Railroad Trainmen, hereinafter called Brotherhood, that Polson Logging Company, a corporation, hereinafter called respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, (49 Stat. 449), here-

inafter referred to as the Act, the National Labor Relations Board by the Regional Director for the Nineteenth Region, as agent of the National Labor Relations Board, designated by the National Labor Relations Board Rules and Regulation, Series 2, as amended, Article IV, Section 1, hereby issues its complaint and alleges the following:

I.

During all the time and on all the dates hereinafter mentioned the respondent was and now is a corporation organized and existing under and by virtue of the laws of the State of Washington, having its principal office and place of business in the City of Hoquiam, State of Washington.

During all the time and on all the dates hereinafter mentioned said respondent has been and now is engaged in the business of producing, selling, and distributing logs, lumber, and lumber products, and has continuously owned and operation a sawmill for the manufacture of lumber, and lumber products at Hoquiam, Washington.

II.

The respondent in the course and conduct of its business causes and has continuously caused a substantial portion of the logs, lumber, and lumber products produced by it to be sold, shipped, and transported in interstate commerce from its operations in and near Hoquiam, Washington, to, into, and through States of the United States, other than the State of Washington.

III.

The respondent in the course and conduct of its business owns, maintains, and operates a logging railroad. Said railroad is connected with the Northern Pacific Railroad, a common carrier. Cars of the Northern Pacific Railroad are operated over the rails of the respondent's railroad. Said Northern Pacific owned cars are loaded and shipped from respondent's loading dumps located on its property to the main line of the Northern Pacific Railroad, and thence to States of the United States, other than the State of Washington.

IV.

Brotherhood of Railroad Trainmen is, and at all times hereinafter mentioned has been, a labor organization within the meaning of Section 2, subsection (5) of the Act.

V.

On or about May 21, 1940, the respondent discharged Dave Lytle, a conductor, and Clayton Reece, a brakeman, and at all times since such date has refused to reemploy them, because of their membership in and activities on behalf of the Brotherhood, or because they refused to remain, or become members of International Woodworkers of America.

VI.

Respondent made statements derogatory to the Brotherhood, and known leaders of the Brother-

hood's organizational movement, in that, among other things,

1. On or about April 1, 1940, by and through Bennett Ellingsen, Assistant Manager, informed its employees that it would close or curtail its operations if the employees joined the Brotherhood; threatened certain of said employees with discharge because of their activities in connection with the solicitation of membership in, the bringing about the formation of, and the taking of membership in said Brotherhood.

2. On or about May 18, 1940, by and through A. M. Polson, General Manager, questioned a number of its employees concerning the formation of the Brotherhood among its employees, and the membership of said employees in said Brotherhood; by statements disparaging to the Brotherhood attempted to discourage the membership of said employees in the Brotherhood, and encourage said employees to undertake, or retain membership in the International Woodworkers of America, affiliated with the Congress of Industrial Organizations, a labor organization within the meaning of Section 2, subsection (5) of the Act.

VII.

By the acts alleged in Paragraph V, the respondent has discouraged, and is discouraging, membership in the Brotherhood, and has encouraged, and is encouraging, membership in the International Woodworkers of America, and has discriminated, and is discriminating, in regard to hire and tenure

of employment, and has engaged in, and is engaging in unfair labor practices within the meaning of Section 8, subsection (3) of the Act.

VIII.

By the acts alleged in Paragraphs V, and VI, and by each of them the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and has engaged in, and is engaging in unfair labor practices within the meaning of Section 8, subsection (1) of the Act.

IX.

The activities of the respondent alleged in Paragraphs V, and VI, herein, occurring in connection with the operations of the respondent as set forth in Paragraphs I, II, and III, herein, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States of the United States and have led and tend to lead, to labor disputes burdening and obstructing commerce and the free flow of commerce.

X.

The acts of the respondents, acting through its officers, agents, and employees, hereinbefore set out, constitute unfair labor practices affecting commerce within the meaning of Section 8, subsections (1) and (3) of the Act, and Section 2, subsections (6) and (7) of the Act.

Wherefore, the National Labor Relations Board on this 30th day of June, 1941, issues its complaint

against Polson Logging Company, respondent herein.

[Seal] THOMAS P. GRAHAM, JR.

Regional Director, National Labor Relations Board,
Nineteenth Region, 407 U. S. Court House,
Seattle, Washington.

[Title of Board and Cause.]

ANSWER TO COMPLAINT

Comes now the Respondent and for answer to the complaint herein admits, denies and alleges as follows:

I.

Answering Paragraph I, Respondent admits the facts alleged therein.

II.

Answering Paragraph II of the complaint, Respondent admits that a substantial portion of the lumber produced and lumber products produced by it from logs cut by Respondent has been sold and shipped in interstate commerce from its operation in and near Hoquiam. Respondent denies that a substantial portion, or any portion, of the logs produced by it has been shipped in interstate commerce or through states in the United States other than the State of Washington.

III.

Answering Paragraph III of the complaint, Respondent admits all of the facts alleged herein ex-

cept that Respondent denies Northern Pacific's own cars are loaded and shipped from Respondent's loading dump located on its property to the main line of the Northern Pacific Railroad, and thence to states of the United States other than the State of Washington.

IV.

Answering Paragraph IV of the complaint, Respondent admits the facts alleged therein.

V.

Answering Paragraph V of the complaint, Respondent admits that it discharged Dave Lytle, a conductor, and Clayton Reece, a brakeman, on or about the 21st day of May, 1940, but denies that the reason for the discharge was because of membership in, and activities for and on behalf of the Brotherhood or because they refused to remain or become members of the International Woodworkers of America. Respondent further admits that it has failed and refused to re-employ said employees.

VI.

Answering Paragraph VI, Respondent denies each and every allegation therein contained.

VII.

Answering Paragraph VII, Respondent denies each and every allegation therein contained.

VIII.

Answering Paragraph VIII, Respondent denies each and every allegation therein contained.

IX.

Answering Paragraph IX, Respondent has no knowledge of the facts therein contained and therefore denies the same.

X.

Answering Paragraph X, Respondent has no knowledge of the facts therein contained and therefore denies the same.

By way of affirmative defense, Respondent alleges that Dave Lytle and Clayton Reece were discharged on or about the 21st day of May, 1940, because of their failure to observe and abide by safety rules and regulations.

Wherefore, Respondent having answered, Respondent prays the complaint and charge herein be dismissed.

R. W. MAXWELL

Attorney for Respondent

R. D. MERRILL

President,

Polson Logging Company

Office and Postoffice Address:

Polson Logging Company, Respondent

Hoquiam, Washington

R. W. Maxwell, Attorney for Respondent

354 Stuart Building

Seattle, Washington

(Duly Verified.)

[Title of Board and Cause.]

Mr. Patrick H. Walker,
for the Board.

Mr. Robert W. Maxwell,
of Seattle, Washington,
for the respondent.

Mr. C. W. Stevens,
of Portland, Oregon,
for the Union.

INTERMEDIATE REPORT

Upon an amended charge¹ duly filed by the Brotherhood of Railroad Trainmen, herein called the Trainmen, the National Labor Relations Board, herein called the Board, by the Regional Director for the Nineteenth Region (Seattle, Washington), issued its complaint dated June 30, 1941, against Polson Logging Company herein called the respondent, alleging that the respondent had engaged and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint, accompanied by notice of hearing, were duly served upon the respondent and the Trainmen.

With respect to the unfair labor practices, the complaint alleged in substance (1) that on or about

¹The original charge was filed on July 8, 1940, and the amended charge on June 30, 1941.

May 21, 1940, the respondent discharged Dave Lytle, a conductor, and Clayton Reece, a brakeman, because of their membership in the Trainmen; (2) that the respondent threatened to close down or curtail its railroad operations if its employees joined the Trainmen or the Brotherhood of Locomotive Firemen and Enginemen, herein called the Firemen, and by other acts and statements the respondent disparaged the Trainmen and Firemen in an attempt to discourage membership in the Trainmen and Firemen by its employees and sought to encourage them to become or retain membership in the International Woodworkers of America, an affiliate of the Congress of Industrial Organizations.²

On July 11, 1941, the respondent filed its answer to the complaint, admitting that it was engaged in interstate commerce within the meaning of the Act, but denying it had engaged in the alleged unfair labor practices. The answer further alleged by way of affirmative defense that it had discharged Lytle and Reece because of their failure to observe and abide by safety rules and regulations.

Pursuant to notice, a hearing was held in Hoquiam, Washington, on July 28, 29, 30 and 31 and September 12 and 13, 1941, before the undersigned, the Trial Examiner duly designated by the Chief

²The Firemen and the I. W. A. were not made parties to these proceedings. Copies of the complaint were not served upon them and they did not participate in the proceedings. See footnote 11 on page 6, *infra*.

Trial Examiner. The Board, the respondent, and the Union were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties.

At the close of the Board's case the respondent moved to strike certain testimony from the record³ and also moved to dismiss the complaint on the ground that the evidence offered failed to sustain the allegations therein. Rulings were reserved and the motions are hereby denied. At the close of the hearing the attorney for the Board moved to conform the complaint to the proof, which motion was granted.

At the conclusion of the hearing, the parties were afforded and waived opportunity to make oral argument. Counsel for the respondent and the Union asked leave to file briefs, which have been received and considered by the undersigned.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. The business of the respondent

Polson Logging Company is a Washington corporation. Its principal office is in Hoquiam, Wash-

³The motion to strike testimony was directed to that testimony appearing on page 162, line 1 to page 165, line 22; page 228, lines 5 to 21; and page 255, line 1 to page 268, line 17.

ington, and it is engaged in logging and sawmill operations in the vicinity of Hoquiam, Washington.

The parties herein stipulated that during the year 1939 the respondent produced approximately 98,000,000 board feet of logs, about 64,000,000 board feet of which were processed into lumber in its own sawmill. The balance of the logs were sold to other sawmills operated in the State of Washington. Of the lumber processed in the respondent's sawmill, approximately 9 per cent was sold and transported in interstate commerce. In connection with and as part of its logging operations, the respondent operates a railroad system for the transportation of logs from the woods to tidewater. The trains run over approximately 45 miles of railroad. The respondent employs approximately 500 men in its logging operations, approximately 33 of whom are engaged in the operation of the respondent's railroad equipment. It was further stipulated that the respondent is presently engaged in business affecting commerce within the meaning of the Act.⁴

⁴The facts above stipulated concern the operations for the calendar year of 1939. They were obviously based upon the findings concerning the respondent's business made in the Board's Decision and Order entered April 24, 1941, in the representation proceedings in which the respondent, Trainmen and Firemen were parties and there being no substantial changes in the business operations, the former findings were adopted herein for convenience. See *Polson Logging Company and Brotherhood of Railroad Trainmen and Polson Logging Company and Brotherhood of Locomotive Firemen and Enginemen*. 31 N.L.R.B. No. 52.

II. The organization involved

Brotherhood of Railroad Trainmen is a labor organization admitting to membership all trainmen employed by the respondent engaged in railroad operations.⁵

III. The unfair labor practices

A. Background of labor organization and labor relations

In 1935 many of the respondent's employees became members of United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor, and continued as members in this organization until 1937 when they shifted their affiliation to the International Woodworkers of America, hereinafter called the I.W.A., an affiliate of the Congress of Industrial Organizations. The respondent since 1937 has been bargaining with the I.W.A. as the sole collective bargaining agency for all of its employees, except superintendents, foremen, timekeepers, bullbuckers, civil engineers, check scalers and office employees.

In February 1940 some of the respondent's railroad workers wished to join the Trainmen or the Firemen and requested Dave Lytle, a head brake-

⁵The complaint alleged that the respondent encouraged membership in the International Woodworkers of America, affiliated with the Congress of Industrial Organizations, in violation of Section 8 (1) of the Act; however, the I.W.A. was not a party to these proceedings nor had a copy of the complaint and notice of hearing been served upon it.

man and old time Brotherhood member, to assist them. Lytle wrote to the secretary of Lodge 403 of the Trainmen at Tacoma, Washington, secured a number of application blanks, and distributed the applications to the employees engaged in railroad operations. Lytle spent much of his spare time during March and April of 1940 in organizing the men and it appears that before May 1, 1940, substantially all of the railroad employees had joined either the Trainmen or the Firemen.

On July 8, 1940, the Brotherhood of Railroad Trainmen and the Brotherhood of Locomotive Firemen and Enginemen filed separate petitions alleging that questions affecting commerce concerning the representation of employees of the respondent herein had arisen and requested an investigation. The cases were consolidated and a hearing held. On April 24, 1941, the Board issued its Decision and Order in which it found that the units contended for by the Trainmen and the Firemen and Engineers were inappropriate,⁶ and dismissed the petitions of the two Brotherhood unions.

B. Acts of interference, restraint and coercion

During the aforesaid period when Lytle was engaged in promoting the organization of the railroad employees into the Trainmen and Firemen brotherhoods, Bennett Ellingson, assistant superintendent

⁶Polson Logging Company and Brotherhood of Railroad Trainmen and Polson Logging Company and Brotherhood of Locomotive Firemen and Enginemen, 31 N.L.R.B., No. 52.

of the respondent, attempted to discourage them from joining those unions. Wood, a locomotive engineer, testified that on or about May 1 while his train was waiting on a siding, Ellingson came up to him and asked how the locomotive was working. Wood replied that it was working satisfactorily, whereupon Ellingson stated, in substance: that there was a lot of repair work needed on the engine; that the respondent had intended to put it into the shop for overhauling together with other engines needing repairs, but that since Brotherhood trouble was apparently developing, the respondent had decided not to make engine repairs, and might decide to close down operations. Wood replied that he did not think there would be any trouble, the men did not want any and Ellingson replied that Groves⁷ had brought on the trouble and was a trouble maker. Wood then said that he did not think Groves had "brought up anything more than anyone else," that they were all dissatisfied with the setup with the C.I.O. and had made up their minds to go into the Brotherhood. John Harlan, a locomotive fireman, testified that on or about April, 1940, Ellingson told him that "C. B. Groves was leading us astray." Shortly thereafter, while on Harlan's locomotive, Ellingson told Harlan that the Northern Pacific was going to take over the Polson railroad operations. Nels Hill, a brakeman, testified that he was present during a conversation between Ellingson

⁷C. B. Groves was a brakeman and a member of the Trainmen.

and Frank Landi, a section foreman, in April or May, 1940, on which occasion Ellingson told Landi that there were two unions in existence among the employees and that they were fighting one another and that some day they would all be "going down the road" (obviously meaning the union members). Tony Plesha, a member of the railroad construction gang, testified that during April or May 1940 Ellingson approached Plesha and Bert Fenton, an engineer, and asked them if they belonged to one of the Brotherhood unions. Plesha replied that they did, whereupon Ellingson asked them what they were going to do when the Northern Pacific took over the respondent's railroad. Dave Lytle testified that in April 1940 while he was working on a gravel train, Ellingson asked him if the railroad men were joining the Brotherhoods.

Ellingson denied that he had made the aforesaid statements or inquiries, but admitted he had held conversations with the persons above mentioned on the occasions specified. Landi was also called as a witness by the respondent and testified that he had no recollection of Ellingson having made the statements to him which Hill claimed to have overheard.

Upon consideration of all of the evidence in the record and upon the observation of the witnesses, the undersigned accepts the testimony given by Wood, Harlan, Hill, Plesha and Lytle as credible and true.

C. B. Groves, the brakeman hereinbefore mentioned, was working at respondent's camp 6 in April

1940. Vic Lehman, the camp foreman, called him aside one day and in substance stated that he, Lehman, had been a friend of Groves for a long time and was warning Groves to be careful about discussing Brotherhood affairs as somebody was going to be discharged and it might be Groves.⁸

The above facts clearly indicate that the respondent was opposed to having its railroad employees affiliate with the Trainmen or Firemen. Moreover, Ellingson's remarks made directly to, or in the presence of, some of its railroad employees would tend to discourage membership in the Brotherhood unions. Lehman's statement to Groves clearly indicated that the respondent contemplated summary action to discourage activities in the Brotherhood unions.

The undersigned finds that the respondent, by the statements of Ellingson, its assistant superintendent, and Lehman, a camp foreman, has interfered with, restrained and coerced its employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain

⁸Counsel for the respondent moved to strike Groves' testimony, on the ground that it was hearsay, that Lehman was no longer employed by the respondent, and that the statement, if made, was not binding upon the respondent. Lehman was a camp foreman with power to hire and discharge the camp employees even though he was not Groves' supervisor. Groves' testimony was given on July 28, 1941, and the respondent's evidence was taken on September 12 and 13 and no showing was made that the respondent was unable to produce Lehman as a witness.

collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining and other mutual aid and protection as guaranteed in Section 7 of the Act.

C. The discriminatory discharges

The complaint alleged that the respondent discharged and refused to reinstate Dave Lytle, a conductor, and Clayton Reece, a brakeman, on or about May 21, 1940, and thereafter refused to reinstate them, because of their membership in and activities on behalf of the Trainmen, and because they refused to remain or become members of the International Woodworkers of America. The answer admitted that Lytle and Reece were discharged on or about the time alleged, but denied that the terminations were based on union membership or activities. In an affirmative defense pleaded, the respondent alleged that the above discharges were made for failure to observe and abide by safety rules and regulations.

Dave Lytle was first employed by the respondent in the fall of 1934. He started to work as a second brakeman and after 3 weeks was promoted to a job as first brakeman. In railroad practice the duties of a first brakeman are similar to those of a conductor. The first brakeman receives train orders from the dispatchers and transmits the orders to the other employees on the train. In the fall of 1938 he quit and was off duty for several weeks until Bill Gordon, then respondent's trainmaster, came to his home and requested him to return to work. Lytle did

return and continued in his employment with the respondent until he was discharged on May 21, 1940. He was chairman of the general committee of the Firemen.

Clayton Reece was first employed as a second brakeman in 1928. He was injured in 1930 and did not return to work for the respondent until 1933. After 2 months in the respondent's employ in 1933, he quit. He was rehired in May 1939 and remained continuously employed by the respondent until he was discharged on May 21, 1940. He was secretary of the general committee of the Firemen.

On or about May 16, 1940, Lytle called at the respondent's office at Hoquiam and asked F. A. Polson,⁹ commonly called Arnold Polson in the record, to name a date for a negotiating conference between the respondent and a committee representing the Trainmen and Firemen and Polson said he would see the committee on Saturday, May 18, 1940. On May 18, Dave Lytle, Clayton Reece, Sam Key and Lawrence Brant¹⁰ appeared as representatives of the Brotherhoods and Arnold Polson, A. N. Polson, commonly called Alec Polson in the record, and Bennett Ellingson, were present as representatives of management. The Union committee presented a proposed form of agreement covering the employees

⁹F. A. Polson, A. N. Polson and Bennett Ellingson, respectively, occupied positions as general manager, superintendent and assistant superintendent in the respondent's business.

¹⁰Lytle and Reece represented the Trainmen and Key and Brant the Firemen.

engaged in railroad operations for the respondent, together with a covering letter stating that a majority of the conductors and brakemen, and of the engineers and firemen had designated the Trainmen and Firemen, respectively, to represent them for collective bargaining purposes and requesting that the respondent sign the agreement tendered. Arnold Polson was spokesman for the respondent and Dave Lytle the spokesman for the Union committee. Polson read the proposed agreement and stated that before giving the question further consideration he wanted to consult with counsel and also stated that the International Woodworkers of America, an affiliate of the Congress of Industrial Organizations, had been bargaining on behalf of all of the respondent's employees and that Key and Brant had previously appeared before him as members of C.I.O. committees. Polson further stated that the respondent was not operating a railroad but was engaged in the logging business and that he thought one union in the business better than two since if there were two unions, jurisdictional disputes were likely to arise.¹¹ At the conclusion of the confer-

¹¹The complaint alleged that these statements of Arnold Polson on May 18, 1940, discouraged membership in the Brotherhoods and encouraged membership in the I.W.A. When it is considered, however, that the remarks were made to a union negotiating committee, it would seem to follow that the respondent had some privilege to state its position to union representatives. The respondent, however, had no privilege to discharge its employees for Brotherhood activities.

ence, Lytle requested a written reply to the above letter.

On May 29, 1940, the respondent replied and stated that the respondent had entered into agreements with Local 2, I.W.A., covering all of the employees, for a number of years, and still recognized the I.W.A. as the exclusive bargaining agency for all of its employees.

Following the conference on Saturday, May 18, 1940, Lytle and Reece worked on May 20 and May 21, 1940. After quitting work on May 21 they both went into the trainmaster's office to look at the call board and ascertain what their work assignments were for the following day. A black cross had been marked against both of their names on the board and no work assignments for the following day were designated. They asked the trainmaster, Groseclose, what runs they were to take on May 22, 1941. Groseclose, according to Lytle, replied, "Tomorrow is your day off," and further said, "You are not going to work any more until you see Bennett Ellingson." They asked Groseclose why they were being laid off. He replied that Ellingson had said it was for failure to flag the Axford Prairie crossing. Lytle attempted to get in touch with Ellingson at the respondent's camps during May 22, but was not successful. In the evening of the same day he called Ellingson at his home, and, according to Lytle's testimony, Ellingson said, "I can't see you today, I will see you Saturday." On Saturday Lytle saw Ellingson at the Polson office

in Hoquiam and asked why he had been laid off. Ellingson, according to Lytle, stated, "For not flagging the Axford Prairie crossing." Lytle replied, "It has never been flagged," and further said, "You can't flag that crossing without stopping the train and going ahead to flag it." Whereupon Ellingson said, "You don't have to stop. I want you to flag it from the point of the car." Lytle also asked if Ellingson was laying Reece off and Ellingson replied yes, and for the same reason he was laying off Lytle. Lytle then asked if he was to be discharged and Ellingson said that he would let Lytle know on Monday, as he had to consult Arnold Polson first. Reece did not talk with Ellingson in reference to his discharge, but called Groseclose on May 22, 1940, and was told by Groseclose that there would be no work for him for the rest of the week. Reece again called Groseclose on Sunday, May 26, and Groseclose again stated there was no work for him, whereupon Reece requested Groseclose to call him when he needed him. On or about June 15, 1940, Reece called at the Polson office in Hoquiam to inquire about his status and was handed a separation report. The reason stated in the report for the discharge was, "violation of safety rules and/or unsafe operation." A similar separation notice was delivered to Lytle on or about June 15, 1940.

Ellingson testified that on the morning of May 21 he had left the railroad camp of the respondent about 5 a. m. and drove westerly on the highway

towards the Quinalt forest reservation. He caught up with the respondent's engine 18 and followed it to Axford Prairie crossing and noted that the engineer blew his whistle as usual when approaching the crossing, but that neither brakeman was out on the platform of the crummy car and that the door of the dog house was closed.¹² Ellingson stated that he then returned to the railroad camp and put a check mark against the names of Lytle and Reece on the call board and told Trainmaster Groseclose not to put them back to work until he, Ellingson, had talked with them. Later in the day Ellingson discussed the incident with Alec Polson and about 7 o'clock that same night reported the incident to Arnold Polson. A few days later Ellingson, Arnold and Alec Polson further discussed the incident at the respondent's railroad camp when it was decided to discharge both Lytle and Reece for failing to come out of the dog house and ride on the front of the crummy car to signal or flag the engineer across the Axford Prairie crossing. Ellingson had authority to hire and discharge employees and it is significant that this alleged breach of duty required the consideration of three of the respondent's offi-

¹²The crummy car is a flatcar having an enclosed shanty, commonly called a dog house, constructed on one end. The so-called dog house serves the purpose usually served by a caboose operated in connection with railroad freight trains. The dog house has windows in the front and sides and a sliding door in the rear. The side windowpanes are fixed in sliding panels and may be opened or closed.

ciala over a period of several days before a decision was reached as to the disciplinary action to be taken.

The respondent admitted that the only rules or regulations concerning safety operations had been transmitted to employees by verbal instructions. It contended that for many years a rule had been established and generally observed which required both brakemen or one of them to ride out on the front end of the crummy car when the train approached a crossing and from that station to signal the engineer to slow down the train and thereafter, if the intersection was clear, to signal the engineer to proceed across.

Arnold Polson, now general manager, was superintendent and supervisor of railroad operations from 1930 to the early part of 1934. During this period it was the respondent's general practice to push all cars making up a train ahead of the engine. In this type of operation, it had been the understood practice for the head brakeman to ride on the point of the train,¹³ signal the engineer to stop on approaching a crossing, the head brakeman then to get off and check the intersection for traffic and signal the engineer to proceed across if the way was clear. This rule or practice was admittedly understood and had been followed by respondent's railroad employees when the trains were operated under those conditions and is not involved as an issue herein.

¹³On the front end of the first car.

In 1934 after Arnold Polson was made general manager, Jack Morgan succeeded him as the supervisor directly in charge of railroad operations. Morgan effected changes in the method of operation. He ordered that all cars other than the crummy car be hauled behind the locomotive. The crummy car, however, was coupled in front of the locomotive and pushed. Since this method was adopted, it has become the accepted practice, except that on rare occasions some additional cars have been pushed ahead of the engine.

After the above change, the practice of stopping at most of the crossings was abandoned.¹⁴ The train slowed down at crossings, the engineer blew the whistle, and proceeded if the crossing was clear of traffic.

As above stated, the respondent customarily did not issue written rules or instructions to its railroad employees; the record fails to show that after the aforesaid operating changes any specific instructions were issued to all of them concerning their duties.

Alec and Arnold Polson, Ellingson and Grose-

¹⁴There were exceptions made, however, as to crossings No. 3 and No. 5, at which the trains continued to stop and the brakeman got off, inspected traffic conditions, and then signaled the engineer to proceed if the way was clear. In 1937 or 1938, Ellingson ordered them to discontinue these stops at crossings No. 3 and No. 5 and follow the procedure observed at the other crossings.

close¹⁵ all testified that following the above discussed changes in operation, they had given verbal instructions pertaining to safety measures to the railroad employees individually and that in these instructions the railroad employees were told that one of the brakemen should stand out on the front end of the crummy car when it only was being pushed ahead of the engine, to signal the engineer to slow down on approaching a crossing, and thereafter to signal the engineer to proceed across if the highway was clear. Ellingson testified that in April 1940 he had reprimanded Lytle for being careless about flagging crossings. Groseclose testified that about 2 weeks before Lytle was discharged, Lytle told him that he had been reprimanded by Ellingson for not flagging crossings. It is significant that the incident which gave rise to the alleged reprimand concerned not Lytle's failure to flag a crossing, but his responsibility in the matter of a "runaway engine." Lytle denied that he had been so reprimanded and further denied that he had ever told Groseclose that he had been. Based upon his observation of the witnesses and upon the entire record, the undersigned has accepted Lytle's testimony as true.

Kalis Heck, presently a shop helper but formerly

¹⁵Groseclose, who had formerly been a brakeman, was promoted to the train master's job in 1939. He was under the immediate supervision of Ellingson, the assistant superintendent, and supervised train movements.

a brakeman, who was called as a witness by the respondent, testified that he was told by the above named and other supervisors, when he was working as a brakeman, that when the crummy car was being pushed ahead of the engine, the brakeman, or one of them, should be out on the front end of the crummy car before making a crossing, to signal the engineer to slow down and then signal the engineer to proceed across if the way was clear. It was also stipulated that during the latter part of 1937 and early in 1938, after three highway accidents had occurred near crossings, the Aetna Casualty Company, the respondent's insurer, sent Charles Young to check and report to the insurance company on the respondent's operations. It was further stipulated by the parties that if Young were called as a witness he would testify that he was informed by the respondent's safety engineer that the company had instructed trainmen to flag crossings, that Young made spot checks at highway crossings during the latter part of 1937 and early part of 1938, and that these checks disclosed that the highway crossings were being flagged.

Dave Lytle, a head brakeman, denied he was instructed by any supervisor to flag the engineer from the front end of the crummy car while proceeding over a crossing and further testified that on occasional runs when he acted as a second brakeman his head brakeman had never flagged crossing No. 1, known as Axford Prairie crossing, or ordered Lytle to do so. Lytle on cross-examination quali-

fied the above testimony by admitting that he had flagged crossing No. 3 and No. 4 (No. 4 being presently known as No. 5) during night runs, on instructions from Alec Polson. Paul Pauley, head brakeman for about 2½ years testified that until after Lytle and Reece were discharged he was never instructed to ride out on the platform of the crummy car when it was being pushed ahead of the engine. Pauley admitted, however, that he usually stepped outside of the dog house while running over crossings as he had previous railroad experience before working for the respondent and thought he should do so. Nels Hill, a brakeman since 1912, testified that neither of the Polsons, Ellingson, or Groseclose had informed him of any rules or regulations concerning train operations prior to Lytle's discharge. Hill admitted on cross-examination that in 1937 he had been riding out on the front car of a train and flagged the engineer to stop the train at a crossing. On this occasion there was another car or cars ahead of the crummy car and Hill was on the head car, rather than on the crummy. This was standard practice under the old method of operation and offers no support to respondent's contention that the brakeman was instructed to ride on the front of the crummy car when it only preceded the engine. C. B. Groves, testified he had never received any instructions to flag crossing No. 1, Axford Prairie, unless they were pushing empties ahead of the engine, until after Lytle and Reece were discharged. Groves further testified that he

never flagged his engineer at crossings unless he saw a car coming along the highway, when he would go out on the crummy to see if the engineer saw it also and if the engineer apparently observed it he did not signal him. Reece also testified that he had never been instructed by any supervisor that one of the brakemen was required to ride out on the front end of the crummy car to flag or signal the engineer at crossings.

Key, Wood, Wicklund and Corrigan, all engineers on respondent's railroad, testified in substance that they had been instructed to slow down and blow the locomotive whistle frequently before reaching the crossings; that they were not instructed to look to the brakeman for operating signals at crossings, but that they together with their firemen watched the crossings and used their own judgment as to whether to stop or proceed. Key further testified that sometimes the brakemen on his train stood out on the platform of the crummy car while passing over crossings and at other times they remained in the dog house; also that he would have to lean so far out of the cab window of his engine to see a brakeman standing on the front of the crummy car that it would take him away from the engine controls. Corrigan, the engineer on the train Lytle and Reece were brakemen on at the time they were discharged, testified that while the head brakeman on his trains usually stepped out of the dog house while passing over crossings, he could not say that all of them did.

The record indicates that while it may have been a general practice among a number of employees who had responsibility in the matter, to flag crossings at such times as the crummy was being pushed ahead of the engine, there was a wide difference in understanding among them as to whether this practice was required in strict compliance with the respondent's safety rules or was a matter left more to the individual judgment. The alleged rule on flagging crossings, admittedly oral, may have been communicated to certain of the employees responsible for that function, but the undersigned is not convinced that it was specifically communicated to all employees responsible for its observance, and credits the testimony of Lytle and Reece that it was not communicated to them. It further appears that prior to the discharge of Lytle and Reece, no brakeman had been reprimanded or disciplined for similar violations of the alleged rule. Alec Polson and Ellingson, the respondent's superintendent and assistant superintendent, respectively, admitted that no other employees had ever been laid off or discharged for violation of the alleged rule.

The evidence shows that Lytle was the leader in the organization of the two Brotherhood unions among the railroad employees of the respondent, and that Reece, while engaging in such activities to a somewhat lesser extent was closely associated with Lytle, in those activities. Reece and Lytle were members of the Brotherhood committee which met with the respondent's representatives on May

18. It is clear, therefore, and is not denied, that the respondent had knowledge of their union affiliation and activities. As has been found in Section B, *supra*, the respondent opposed the organization of the Brotherhood unions among its employees. The infraction of the alleged safety rule by Lytle and Reece, followed by their discharge, occurred only 3 days after the May 18 meeting.

Upon consideration of the entire record, the undersigned finds that the respondent discharged Dave Lytle and Clayton Reece on May 21, 1940, and thereafter refused to reinstate them, because they joined and assisted the Brotherhood of Railroad Trainmen and engaged in concerted activities with other employees of the respondent for the purposes of collective bargaining and other mutual aid and protection.

The undersigned finds that the respondent discriminated in regard to the hire and tenure of employment of Dave Lytle and Clayton Reece, thereby discouraging membership in the Brotherhood of Railroad Trainmen.

IV. The effect of the unfair labor practices upon commerce

The activities of the respondent as set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor disputes bur-

dening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the respondent has engaged in and is engaging in unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action deemed necessary to effectuate the policies of the Act.

It has been found that the respondent discharged Dave Lytle and Clayton Reece upon May 21, 1940, and thereafter refused to reemploy them for the reason that they had joined and assisted a labor organization and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection. It will therefore be recommended that the respondent offer them immediate and full reinstatement to their former or substantially equivalent positions. It will be further recommended that the respondent make them whole for any loss of pay they have suffered by reason of their discharge by payment to them of a sum equal to that amount which they would normally have earned as wages from the date of their discharge to the date of their offer of reinstatement, less their net earnings,¹⁶ during said period.

¹⁶By "net earnings" is meant earnings less expenses, such as for transportation, room and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See

CONCLUSIONS OF LAW

1. Brotherhood of Railroad Trainmen is a labor organization within the meaning of Section 2 (5) of the Act.

2. By interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

3. By discriminating in regard to the hire and tenure of employment of Dave Lytle and Clayton Reece, and thereby discouraging membership in the Brotherhood of Railroad Trainmen, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (3) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law and upon the entire record in this case, the undersigned recommends that the re-

Matter of Crossett Lumber Company and United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers Union, Local 2590, 8 N.L.R.B. 440. Monies received for work performed upon Federal, State, county, municipal or other work-relief projects shall be considered as earnings. See Republic Steel Corporation v. N.L.R.B., 311 U. S. 7.

spondent, Polson Logging Company, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in the Brotherhood of Railroad Trainmen, or any other labor organization of its employees, by discharging, laying off, or refusing to reinstate any of its employees, or in any other manner discriminating in regard to their hire or tenure of employment or any terms or conditions of employment;

(b) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Offer to Dave Lytle and Clayton Reece, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges;

(b) Make whole the said Dave Lytle and Clayton Reece for any loss of earnings resulting from the respondent's discrimination against them by payment to each of them of a sum of money equal

to that which they would normally have earned as wages from May 21, 1940, to the date of the respondent's offer of reinstatement, less their net earnings¹⁷ during said period;

(c) Immediately post notices in conspicuous places throughout its lumber camps in the vicinity of Hoquiam, Washington, and maintain such notices for a period of at least sixty (60) consecutive days stating: (1) that the respondent will not engage in the conduct from which it is recommended that it cease and desist in paragraph 1 (a) and (b) of these recommendations; (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) and (b) of these recommendations; and (3) that the respondent's employees are free to become or remain members of the Brotherhood of Railroad Trainmen and that the respondent will not discriminate against any employee because of membership in or activities on behalf of this organization or any other labor organization of its employees;

(d) Notify the Regional Director of the Nineteenth Region in writing within twenty (20) days from the receipt of this Intermediate Report what steps the respondent has taken to comply herewith.

It is further recommended that unless on or before twenty (20) days from the receipt of this Intermediate Report, the respondent notifies the said Regional Director in writing that it will comply

¹⁷See footnote 16, supra.

with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 2—as amended—any party may within thirty (30) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Shoreham Building, Washington, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within twenty (20) days after the date of the order transferring the case to the Board.

Dated: January 3, 1942.

HENRY J. KENT

Trial Examiner

[Title of Board and Cause.]

RESPONDENT'S EXCEPTIONS TO
INTERMEDIATE REPORT AND RECORD

Received original and 4 copies of Exceptions.

Respondent, Polson Logging Company, herewith enters the following exceptions to the intermediate report, findings and recommendations by the Trial Examiner and the records in the above-entitled case pursuant to Article II, Section 33, of the Rules and Regulations of the National Labor Relations Board, Series 2, as amended.

Respondent excepts:

1. To admission over Respondent's objections of the testimony recorded in the transcript at Page 162, Line 1 to Page 165, Line 22.
2. To refusal of the Trial Examiner to grant Respondent's motion to strike the testimony reported in the transcript at Page 162, Line 1 to Page 165, Line 22.
3. To refusal of the Trial Examiner to grant Respondent's motion to strike the testimony reported in the official transcript on Page 228, Line 5 to 21.
4. To refusal of the Trial Examiner to grant Respondent's motion to strike the testimony reported in the official transcript, Page 255, Line 1 to Page 268, Line 17.
5. To refusal to grant Respondent's motion to dismiss the complaint upon the ground that the evidence does not support or sustain the allegations

of the complaint and the charges against Respondent.

6. To the finding that Respondent has interfered with, restrained and coerced its employees or any of them in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining and other mutual aid and protection as guaranteed in Section 7 of the Act.

7. To findings of the Trial Examiner that Mr. Lytle and Mr. Reece were discharged for their membership in, activity in support of, and for and on behalf of, the Brotherhood of Trainmen.

8. To findings that the company has refused to reinstate Mr. Lytle and Mr. Reece because of their membership in or activity for and on behalf of the Brotherhood of Trainmen.

9. To the finding that Respondent had no regulation requiring that highway crossings be flagged from the front end of the crummy when the engine was pushing the crummy car ahead of it across highway crossings.

10. To the finding that trainmen, enginemen and firemen had not been instructed regarding flagging of highway crossings.

Respondent further objects to the recommendations of the Trial Examiner and hereby enters the following specific objections and exceptions:

1. Referring to Paragraph 1 of the proposed

recommendation of the Trial Examiner, Respondent excepts to Paragraph (a) thereof upon the ground and for the reason that the evidence does not support the entering of such an order and upon the further ground that Paragraph 1 (a) is too broad in any event under the evidence of this case.

2. To Paragraph 1 (b) upon the ground and for the reason that said recommended order is not supported by the evidence herein and upon the further ground that said recommended order is too broad in any event and, more particularly, too broad in the light of the evidence herein.

3. Referring to Paragraph 2 of the proposed recommended order, Respondent excepts to Paragraph (a) thereof upon the ground that said recommendation is not supported by the evidence herein.

4. Referring to Paragraph 2 (b), Respondent objects to the proposed order and recommendations upon the ground and for the reason that it is not supported by the evidence herein and upon the further ground that there is no evidence in the records showing that said David Lytle and Clayton Reece sustained any loss of earnings. Respondent further objects to the entering of any order requiring Respondent to reinstate said individuals with back pay for the period mentioned in the complaint or any period whatsoever, upon the ground and for the reason that said Dave Lytle and Clayton Reece were not discharged because of their membership in or activities for and on behalf of the Brotherhood of Railroad Trainmen or any labor organization

and upon the further ground that said individuals have never made application for reinstatement and upon the further ground that said individuals and the Brotherhood of Railroad Trainmen were guilty of neglect and laches in making any claim before the Board of an unlawful discharge. Respondent objects further upon the ground and for the reason that the said claimants, Dave Lytle and Clayton Reece, and the Brotherhood of Railroad Trainmen which acted for and on behalf of said claimants, did not pray for reinstatement with or without back pay.

5. Respondent objects to Paragraph 2 (c) upon the ground and for the reason that the said recommended order is not supported by the evidence and is too broad in any event.

Dated at Seattle, Washington, this 14th day of January, 1942.

R. W. MAXWELL

Attorney for Respondent, Pol-
son Logging Company.

R. W. Maxwell
354 Stuart Building
Seattle, Washington

United States of America
Before The National Labor Relations Board
Case No. C-2046

In the Matter of

POLSON LOGGING COMPANY
and

BROTHERHOOD OF RAILROAD TRAINMEN

Mr. Patrick H. Walker,
for the Board.

Mr. Robert W. Maxwell,
of Seattle, Wash.,
for the respondent.

Mr. C. W. Stevens,
of Portland, Oreg.,
for the Trainmen.

Mr. Reynolds C. Seitz,
of counsel to the Board.

DECISION AND ORDER

Statement of the Case

Upon an amended charge¹ duly filed by the Brotherhood of Railroad Trainmen, herein called the Trainmen, the National Labor Relations Board, herein called the Board, by the Regional Director for the Nineteenth Region (Seattle, Washington),

¹The original charge was filed on July 8, 1940, and the amended charge on June 30, 1941.

issued its complaint dated June 30, 1941, against Polson Logging Company, Hoquiam, Washington, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint accompanied by notice of hearing, were duly served upon the respondent and the Trainmen.

The complaint alleged in substance (1) that on or about May 21, 1940, the respondent discouraged membership in the Trainmen by discharging Dave Lytle, a conductor, and Clayton Reece, a brakeman, because of their membership in the Trainmen; (2) that the respondent threatened to close down or curtail its railroad operations if its employees joined the Trainmen or the Brotherhood of Locomotive Firemen and Enginemen, herein called the Firemen, and by other acts and statements disparaged the Trainmen and Firemen, herein sometimes collectively called the Brotherhoods, in an attempt to discourage its employees from membership in the Trainmen and Firemen and to encourage them to join or retain membership in the International Woodworkers of America, an affiliate of the Congress of Industrial Organization, herein called the I.W.A.,² and (3) that by the foregoing acts the re-

²The Firemen and the I.W.A. were not made parties to these proceedings. Copies of the complaint were not served upon them and they did not participate in the proceedings.

spondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

On July 11, 1941, the respondent filed its answer to the complaint, admitting that it was engaged in commerce within the meaning of the Act, but denying that it had engaged in the alleged unfair labor practices. The answer further alleged by way of affirmative defense that the respondent had discharged Lytle and Reece because of their failure to observe and abide by safety rules and regulations.

Pursuant to notice, a hearing was held in Hoquiam, Washington, on July 28, 29, 30, and 31 and September 12 and 13, 1941, before Henry J. Kent, the Trial Examiner duly designated by the Chief Trial Examiner. The Board, the respondent, and the Trainmen were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. At the close of the Board's case the respondent moved to strike certain testimony from the record, and also moved to dismiss the complaint on the ground that the evidence offered failed to sustain the allegations therein. Rulings were reserved and subsequently denied by the Trial Examiner in his Intermediate Report. At the close of the hearing the attorney for the Board moved to conform the complaint to the proof. The Trial Examiner granted the motion. During the hearing the Trial Examiner made numerous rulings on other

motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

On October 14, 1941, the parties filed briefs with the Trial Examiner. On January 3, 1942, the Trial Examiner issued his Intermediate Report, copies of which were duly served upon the parties, in which he found that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the Act. He recommended that the respondent cease and desist from such unfair labor practices, that it reinstate Lytle and Reece with back pay, and that it take certain other affirmative action in order to effectuate the policies of the Act. Thereafter, the respondent filed exceptions to the Intermediate Report, and submitted a brief in support of the exceptions. Pursuant to notice duly served on the parties, a hearing for the purpose of oral argument was held before the Board in Washington, D. C., on February 17, 1942. The respondent and the Trainmen were represented by counsel and participated in the argument.

The Board has considered the respondent's exceptions to the Intermediate Report and its brief and, insofar as the exceptions are inconsistent with the findings of fact, conclusions of law, and order set forth below, finds them to be without merit.

Upon the entire record in the case, the Board makes the following:

FINDINGS OF FACT

I. The business of the respondent

Polson Logging Company is a Washington corporation. Its principal office is in Hoquiam, Washington, and it is engaged in logging and sawmill operations in the vicinity of that town. During the year 1939 the respondent produced approximately 98,000,000 board feet of logs, about 64,000,000 board feet of which were processed into lumber in its own sawmill. The balance of the logs was sold to other sawmills operated in the State of Washington. Of the lumber processed in the respondent's sawmill, approximately 90 percent was sold and transported in interstate commerce. There has been no substantial change in the respondent's operations since 1939. In connection with and as part of its logging operations, the respondent operates a railroad system for the transportation of logs from the woods to tidewater. The trains run over approximately 45 miles of track. The respondent employs approximately 500 men in its logging operations, approximately 33 of whom are engaged in the operation of the respondent's railroad equipment. The respondent concedes that it is engaged in commerce within the meaning of the Act.

II. The organization involved

Brotherhood of Railroad Trainmen is a labor or-

ganization admitting to membership employees of the respondent.

III. The unfair labor practices

A. Background of labor organizations and labor relations

In 1935 many of the respondent's employees became members of United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor, and continued as members in this organization until 1937 when they shifted their affiliation to the I.W.A., an affiliate of the Congress of Industrial Organizations. The respondent since 1937 has been bargaining with the I.W.A. as the sole collective bargaining agency for all its employees except superintendents, foremen, timekeepers, bullbuckers, civil engineers, check scalers, and office employees.

In February 1940 some of the respondent's railroad workers wished to join the Trainmen or the Firemen and requested Dave Lytle, a head brakeman and old time Brotherhood member, to assist them. Lytle wrote to the secretary of Lodge 403 of the Trainmen at Tacoma, Washington, secured a number of application blanks, and distributed the applications to the employees engaged in railroad operations. Lytle spent much of his spare time during March and April of 1940 in organizing the men and it appears that before May 1, 1940, sub-

stantially all the railroad employees had joined either the Trainmen or the Firemen.³

B. Interference, restraint, and coercion

During the period when Lytle was engaged in promoting the organization of the railroad employees into the Trainmen and the Firemen, Bennett Ellingson, assistant superintendent of the respondent, made remarks to employees which indicated the respondent's opposition to their organization in those unions.

Wood, a locomotive engineer, was approached by Ellingson on or about May 1, while his train was waiting on a siding. According to Wood, the following conversation took place: Ellingson asked how the locomotive was working. Wood replied that it was working satisfactorily. Thereupon Ellingson stated, in substance, that there was considerable repair work needed on the engine; that the respondent had intended to put it into the shop for

³On July 8, 1940, the Trainmen and the Firemen filed separate petitions alleging that questions affecting commerce concerning the representation of employees of the respondent herein had arisen and requested an investigation. The cases were consolidated and a hearing held. On April 24, 1941, the Board issued its Decision and Order in which it found that the units contended for by the Trainmen and the Firemen and Engineers were inappropriate, and dismissed the petitions of the two Brotherhood unions. See Matter of Polson Logging Company and Brotherhood of Railroad Trainmen and Polson Logging Company and Brotherhood of Locomotive Firemen and Enginemen, 31 N.L.R.B., No. 52.

overhauling together with other engines needing repairs, but that since "Brotherhood trouble" was apparently developing, the respondent had decided not to make engine repairs, and might decide to close down operations. Wood replied that he did not think there would be any trouble, because the men did not want any. Ellingson, nevertheless, remarked that Groves⁴ had brought on the trouble and was a trouble maker. Wood then said that he did not think that Groves had "brought up anything more than anyone else," that they were all dissatisfied with representation by the C.I.O., and had made up their minds to go into the Brotherhood. John Harlan, a locomotive fireman, testified that in April 1940, Ellingson told him that "C. B. Groves was leading us astray" and that shortly thereafter, while on Harlan's locomotive, Ellingson told Harlan that the Northern Pacific was going to take over the Polson railroad operations. Nels Hill, a brakeman, testified that he was present during a conversation between Ellingson and Frank Landi, a section foreman, in April or May 1940, on which occasion Ellingson told Landi that there were two unions in existence among the employees and that they were fighting one another and that some day they would all "be going down the road." Tony Plesha, a member of the railroad construction gang, testified that during April or May 1940 Ellingson

⁴C. B. Groves was a brakeman and a member of the Trainmen.

approached Plesha and Bert Fenton, an engineer, and asked them if they belonged to one of the Brotherhood unions, that Plesha replied that they did, whereupon Ellingson asked them what they were going to do when the Northern Pacific took over the respondent's railroad. Dave Lytle testified that in April 1940 while he was working on a gravel train, Ellingson asked him if the railroad men were joining the Brotherhoods.

Ellingson denied that he had made the aforesaid statements or inquiries, but admitted that he had held conversations with the persons above-mentioned on the occasions specified. Landi was also called as a witness by the respondent and testified that he did not recall that Ellingson made the statements to him which Hill claimed to have overheard. We find, however, as did the Trial Examiner, who heard the testimony and observed the witnesses, that the testimony given by Wood, Harlan, Hill, Plesha, and Lytle is credible and true and that remarks were made by Ellingson substantially as set forth above.

C. B. Groves, the brakeman previously mentioned, testified that while he was working at the respondent's Camp 6 in April 1940, Vic Lehman, the camp foreman, called him aside one day and, in substance, stated that since he had been Groves' friend for a long time he was warning Groves to be careful about discussing Brotherhood affairs as somebody was going to be discharged and it might be Groves. Lehman did not testify. No showing was

made that the respondent was unable to produce him as a witness. We find, as did the Trial Examiner, that the incident occurred as related by Groves.

Assistant Superintendent Ellingson's inquiries into the union affiliation of employees,⁵ his warnings that the respondent might shut down or alienate its railroad operations as a consequence of the Brotherhoods' activities,⁶ and his disparagement of Groves for activity on behalf of the Brotherhoods,⁷ and Camp Foreman Lehman's warning to Groves that discharge might be the penalty for discussion of Brotherhood affairs,⁸ all tended to discourage the respondent's employees from membership in the Brotherhoods, for they indicated the respondent's opposition to such membership.

We find, as did the Trial Examiner, that by the statements of Ellingson and Lehman, above de-

⁵See Matter of W. W. Rushton and Mrs. Mary Rushton, doing business as The Rushton Company and/or The Atlanta Playthings Company and United Paper, Novelty and Toy Workers International Union, 33 N.L.R.B., No. 172.

⁶See Matter of The Times-Picayune Publishing Company and International Typographical Union, Unaffiliated, 32 N.L.R.B., No. 82.

⁷See analogous situation in Matter of Sigmund Freisinger, doing business under the name and style of North River Yarn Dyers and Textile Workers Organizing Committee, 10 N.L.R.B., 1043.

⁸See Matter of Colton and Colman, doing business as Kiddie Kover Mfg. Co. and Amalgamated Clothing Workers of America, 6 N.L.R.B. 355, enforced in 105 F. (2d) 179 (C.C.A. 6).

scribed, the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

C. The discriminatory discharges

The complaint alleged that the respondent discharged and refused to reinstate Dave Lytle, a conductor, and Clayton Reece, a brakeman, on or about May 21, 1940, and thereafter refused to reinstate them because of their membership in and activities on behalf of the Trainmen, and because they refused to remain or become members of the I.W.A. The respondent's answer admitted that Lytle and Reece were discharged at or about the time alleged, denied that the terminations were based on union membership or activities, and alleged that the discharges were made for failure to observe and abide by safety rules and regulations.

Dave Lytle was first employed by the respondent in the fall of 1934. He started to work as a second brakeman and after 3 weeks was promoted to a job as first brakeman. In railroad practice the duties of a first brakeman are similar to those of a conductor. The first brakeman receives train orders from the dispatchers and transmits the orders to the other employees on the train. In the fall of 1938 Lytle quit and was off duty for several weeks until Bill Gordon, then the respondent's trainmaster, came to his home and requested him to return to work. Lytle did return and continued in his employment with the respondent until he was discharged on May 21, 1940. Prior to his discharge

he was chairman of the general committee of the Trainmen.

Clayton Reece was first employed as a second brakeman in 1928. He was injured in 1930 and did not return to work for the respondent until 1933. After 2 months in the respondent's employ in 1933, he quit. He was rehired in May 1939 and remained continuously employed by the respondent until he was discharged on May 21, 1940. Prior to his discharge he was secretary of the general committee of the Trainmen.

On or about May 16, 1940, Lytle called at the respondent's office at Hoquiam and asked F. A. Polson,⁹ commonly called Arnold Polson, to set a date for a negotiating conference between the respondent and a committee representing the Trainmen and Firemen. Polson said that he would see the committee on Saturday, May 18, 1940. On May 18, Dave Lytle, Clayton Reece, Sam Key, and Lawrence Brant¹⁰ appeared as representatives of the Brotherhoods and Arnold Polson, A. N. Polson, commonly called Alec Polson, and Bennett Ellingson, were present as representatives of management. The Brotherhoods' committee presented a proposed form of agreement covering the respondent's employees

⁹F. A. Polson, A. N. Polson, and Bennett Ellingson, respectively, occupied positions as general manager, superintendent, and assistant superintendent in the respondent's business.

¹⁰Lytle and Reece represented the Trainmen and Key and Brant the Firemen.

engaged in railroad operations, together with a covering letter stating that a majority of the conductors and brakemen, and of the engineers and firemen had designated the Trainmen and Firemen, respectively, to represent them for collective bargaining purposes and requesting that the respondent sign the agreement tendered. Arnold Polson was spokesman for the respondent and Dave Lytle the spokesman for the committee. Polson read the proposed agreement. He then stated that before giving the question further consideration he wanted to consult with counsel, that the I.W.A. had been bargaining on behalf of all of the respondent's employees, and that Key and Brant had previously appeared before him as members of I.W.A. committees. Polson further stated that the respondent was not operating a railroad but was engaged in the logging business and that he thought one union in the business better than two since if there were two unions, jurisdictional disputes were likely to arise.¹¹

¹¹The complaint alleged that these statements of Arnold Polson on May 18, 1940, discouraged membership in the Brotherhoods and encouraged membership in the I.W.A. We agree with the Trial Examiner, however, that inasmuch as the remarks were made to a union negotiating committee and merely expressed the respondent's reasoned preference for dealing with one, rather than two unions, they should not be viewed as coercive within the meaning of Section 8 (1) of the Act. We find the statements material, however, as further evidence of the respondent's opposition to the Brotherhoods (See Section III B, *supra*). As such they have bearing upon the discharges which followed.

At the conclusion of the conference, Lytle requested a written reply to the above letter.

On May 29, 1940, the respondent replied and stated that the respondent had entered into agreements with Local No. 2, I.W.A., covering all the employees, for a number of years, and still recognized the I.W.A. as the exclusive bargaining agency for all its employees.

Following the conference on Saturday, May 18, 1940, Lytle and Reece worked on May 20 and May 21, 1940. After quitting work on May 21 they both went into the trainmaster's office to look at the call board and ascertain what their work assignments were for the following day. A black cross had been marked against both of their names on the board and no work assignments for the following day were designated. They asked the trainmaster, Groseclose, what runs they were to take on May 22, 1941. Groseclose replied, "Tomorrow is your day off," and further said, "You are not going to work any more until you see Bennett Ellingson." They asked Groseclose why they were being laid off. He replied that Ellingson had said it was for failure to flag the Axford Prairie crossing.

Lytle attempted to get in touch with Ellingson at the respondent's camps during May 22, but was not successful. In the evening of the same day he called Ellingson at his home, and Ellingson said, "I can't see you today, I will see you Saturday." On Saturday Lytle met Ellingson at the Polson office in Hoquiam and asked why he had been laid

off. Ellingson stated, "For not flagging the Axford Prairie crossing." Lytle replied, "It has never been flagged," and further said, "You can't flag that crossing without stopping the train and going ahead to flag it." Whereupon Ellingson said, "You don't have to stop. I want you to flag it from the point of the car." Lytle also asked whether Ellingson was laying Reece off and Ellingson said he was, and for the same reason. Lytle then asked whether he was to be discharged. Ellingson said that he would let Lytle know on Monday, as he had to consult Arnold Polson first.

Reece did not talk with Ellingson in reference to his discharge, but called Groseclose on May 22, 1940, and was told by Groseclose that there would be no work for him for the rest of the week. Reece again called Groseclose on Sunday, May 26, and Groseclose again stated that there was no work for him whereupon Reece requested Groseclose to call him when he was needed. On or about June 15, 1940, Reece called at the respondent's office in Hoquiam to inquire about his status and was handed a separation report. The reason stated in the report for the separation was, "violation of safety rules and/or unsafe operation." A similar separation notice was delivered to Lytle on or about June 15, 1940. Neither employee has been reinstated.

Concerning the events immediately preceding the discharges Ellingson testified without contradiction as follows: On the morning of May 21 he left Railroad Camp of the respondent at about 5 a. m.,

drove westward, and soon caught up with the respondent's engine Number 18, on which Lytle and Reece were working as brakemen and assistant brakemen, respectively. Ellingson followed the train to Axford Prairie crossing, where the railroad crosses the Olympic State Highway of Washington, a well-paved but only moderately busy artery. There he stopped and noted that the engineer blew his whistle as usual when approaching the crossing, but that neither brakeman was out on the platform of the "crummy" car¹² which was the only car being pushed in front of the engine. Ellingson also observed that the door of the "dog house" which was situated on the end of the "crummy" nearest the engine was closed. After he observed the conduct of the brakemen he returned to Railroad Camp and made a notation against the names of Lytle and Reece on the call board and told Trainmaster Grose-close not to put them back to work until he, Ellingson, had talked with them. Later in the day Ellingson discussed the incident with Alec Polson and about 7 o'clock that same night reported the incident to Arnold Polson. A few days later Elling-

¹²The "crummy" car is a flatcar having an enclosed shanty, commonly called a "dog house," constructed on one end. The "dog house" serves the purpose usually served by a caboose operated in connection with railroad freight trains. It has windows in the front (the side nearest the forward end of the "crummy" car) and at the sides and a sliding door in the rear. The side windowpanes are fixed in sliding panels and may be opened or closed.

son and Arnold and Alec Polson further discussed the incident at the respondent's Railroad Camp and decided to discharge Lytle and Reece for failing to come out of the "dog house" and ride on the front of the "crummy" car to signal or flag the engineer across the Axford Prairie crossing.

The respondent claims that it discharged Lytle and Reece because they violated an existing rule. It contends that it is a rule that whenever, as in the situation here involved, only the "crummy" car is pushed in front of the engine the head brakeman or his assistant must go to the front end of the "crummy" when the train approaches a crossing, and signal the engineer either to proceed or to stop. Witnesses for the respondent testified in substance that this rule came into effect in 1934,¹³ and marked a departure from a former rule which required the engineer to stop at all crossings, and the brakeman to get down on the ground and flag him across the intersection, that the change was occasioned by a new practice of making up most trains so that instead of pushing many cars, the engine pushed only the "crummy" car in front of it, and that the old rule is still in effect in those comparatively rare instances, when more than the "crummy" is pushed in front of the engine. The record is in sharp conflict as to the existence or nonexistence of the alleged rule.

¹³The new rule allegedly did not go into effect at crossings No. 3 and No. 4 until 1937 or 1938. Axford Prairie is crossing No. 1.

Alec and Arnold Polson, Ellingson, and Groseclose¹⁴ all testified that following the above-discussed changes in operation, they had given oral instructions pertaining to safety measures to the railroad employees individually and that in these instructions the railroad employees were told that one of the brakemen should stand out on the front end of the "crummy" car when it only was being pushed ahead of the engine, to signal the engineer to slow down on approaching a crossing, and thereafter to signal the engineer to proceed across if the highway was clear.¹⁵ Kalis Heck, presently a shophelper but

¹⁴Groseclose, who had formerly been a brakeman, was promoted to the trainmaster's job in 1939. He was under the immediate supervision of Ellingson, the assistant superintendent, and supervised train movements.

¹⁵Arnold Polson further testified that he had left copies of the State of Washington Loggers Safety Standards in the trainmasters shed in Railroad Camp and had posted a notice ordering all the railroad employees to take a copy. There is conflict in the record as to whether these booklets were actually made available. The majority of the trainmen who testified said that they never saw such notice or a copy. In any event the only applicable section is one which provides that "unless equipped with air, no equipment shall be pushed ahead of the locomotive, unless a brakeman is on head car in constant view of the engineer." An air line ran through the "crummy" here involved. Because it could only be operated from the front end, the respondent claims that the rule required the brakeman to be out on the front of the "crummy." On its face the quoted rule is inapplicable to the in-

formerly a brakeman, who was called as a witness by the respondent, corroborated this testimony of the Polsons, Ellingson, and Groseclose, testifying that while working as a brakeman he had been apprised of the rule in question by them and their superiors. It was also stipulated that during the latter part of 1937 and early in 1938, after three highway accidents had occurred near crossings, the Aetna Casualty Company, the respondent's insurer, sent Charles Young to check and report to it on the respondent's operations, and that if Young were called as a witness he would testify that he was informed by the respondent's safety engineer that the respondent had instructed trainmen to flag crossings, that he made spot checks at highway crossings¹⁶ during the latter part of 1937 and early part of 1938, and that these checks disclosed that the highway crossings were being flagged. Ellingson testified that when Lytle had been laid off on May 21, he admitted to him that he had been in the wrong for not flagging.

On the other hand, Dave Lytle, who is a head

stant situation. Hence we need not resolve the conflict in testimony as to whether or not it was in force among the respondent's employees.

¹⁶We assume that Young would testify that he checked the Axford Prairie as well as all the other crossings. At the Axford Prairie crossing in 1937-38 it was necessary only to do the kind of flagging applicable to situations in which the "crummy" alone was pushed in front of the engine.

brakeman, denied that he had been instructed by any supervisor to flag the engineer from the front end of the "crummy" car while proceeding over a crossing and further testified that on occasional runs when he acted as a second brakeman his head brakeman had never flagged the Axford Prairie crossing, or ordered him to do so. Lytle on cross-examination qualified the above testimony by admitting that he had flagged crossings No. 3 and No. 4 (No. 4 being presently known as No. 5) during night runs, on instructions from Alec Polson. Paul Pauley, head brakeman for about 21½ years testified that until after Lytle and Reece were discharged he was never instructed to ride out on the platform of the "crummy" car when it was being pushed ahead of the engine. Pauley admitted, however, that he usually stepped outside the "dog house" while running over crossings as he had had previous railroad experience before working for the respondent and thought he should do so. Nels Hill, a brakeman since 1912, testified that neither of the Polsons, Ellingson, nor Groseclose had informed him of any rules or regulations concerning train operations prior to Lytle's discharge. Hill admitted on cross-examination that in 1937 he had been riding out on the front car of a train and flagged the engineer to stop the train at a crossing. He stated, however, that on that occasion there was another car or cars ahead of the "crummy" car and he was on the head car, rather than on the "crummy." C. C. Groves, testified that he had never received any

instructions¹⁷ to flag the Axford Prairie crossing unless they were pushing empties ahead of the engine, until after Lytle and Reece were discharged. Groves further testified that he never flagged his engineer at crossings unless he saw a car coming along the highway, when he would go out on the "crummy" to see if the engineer saw it also, and if the engineer apparently observed it he did not signal him. Clayton Reece also testified that he had never been instructed by any supervisor that one of the brakemen was required to ride out on the front end of the "crummy" car to flag or signal the engineer at crossings.

Key, Wood, Wicklund, and Corrigan, all engineers on the respondent's railroad, testified in substance that they had been instructed to slow down and blow the locomotive whistle frequently before reaching the crossings; that they were not instructed to look to the brakeman for operating signals at crossings, but that they together with their firemen watched the crossings and used their own judgment as to whether to stop or proceed. Key further testified that sometimes the brakemen on his train stood out on the platform of the "crummy" car while passing over crossings and

¹⁷Groves had admitted in a previous representation proceeding before the Board (Matter of Polson Logging Company and Ozette Railway Company and Brotherhood of Railroad Trainmen, 31 N.L.R.B., No. 52.) that the respondent had certain unwritten rules which governed the conduct of employees.

at other times they remained in the "dog house." Corrigan, the engineer on the train on which Lytle and Reece were brakemen at the time they were discharged, testified that while the head brakemen on his trains usually stepped out of the "dog house" while passing over crossings, he could not say that all of them did.

The Trial Examiner in the Intermediate Report found that while it may have been a general practice among a number of the employees to flag crossings at such times as the "crummy" was the only car being pushed ahead of the engine, there was a wide difference in understanding among them as to whether this practice was required in strict compliance with any safety rules or was left more to individual judgment. He stated that he was not convinced that the alleged rule had been communicated to all the employees, and found that it had not been communicated to Lytle and Reece. Under all the circumstances, including the practice of some of the employees (among whom were witnesses who denied the rule's existence) of complying with the alleged terms of the rule, and the hazardous nature of the situation to which the rule was supposed to apply, we find that there was a rule requiring a brakeman to be on the front end of the "crummy" when it alone was being pushed by the engine, and to signal the engineer either to stop or proceed when the train approached the Axford Prairie crossing. We find further, that in view of the nature and length of their employment Lytle and

Reece were chargeable with knowledge of the rule, whether or not they were in fact directly apprised of its existence by a superior.

It remains to be determined whether the respondent discharged Lytle and Reece for their undenied failure to observe the requirements of the rule in question, or for their union activities.¹⁸

We consider first the seriousness of the infraction in the circumstances in which it occurred. The evidence is that the respondent's engine was traveling at a speed of about 8 miles an hour as it approached a sufficient view of the highway to enable him to stop the train had it become necessary to do so. Moreover, Lytle and Reece, in the dog house, had a good view of the highway from its windows and could have signaled the engineer if necessity had arisen. On the whole, the two men appear to have violated the letter, rather than the spirit, of the safety regulation in question. We conclude that these circumstances were apparent to Ellingson when he observed the violation of the rule. Further, Corrigan, the engineer, testified that he kept an independent lookout. This information, too, was available to Ellingson had he seen fit to inquire of Cor-

¹⁸We are not concerned with the manner and extent to which employers maintain discipline and whether penalties imposed for infractions of rules are reasonable. We must consider, however, whether the respondent herein exacted the severe penalty of discharge, not to maintain observance of its rules but to cloak a discharge for union activity.

rigan. With due regard for considerations of public safety, we are of the opinion that the offense of which Lytle and Reece were guilty was one which would normally have been condoned, or passed with a reprimand or minor penalty. This is especially so inasmuch as the two men had seen considerable service with the respondent and had never before been reprimanded for failure to observe safety rules,¹⁹ and inasmuch as Alec Polson and Ellingson admitted that no other employee had ever been laid off or discharged for violation of the rule in question. We are unable to assume that the incident in question was the first breach of that rule which had been observed by the respondent's officials.

Under the circumstances the manner in which the discharges were effected contributes to our conviction that the men were accorded special treatment. The respondent neither confronted nor interrogated them concerning their behavior, and afforded them no opportunity to explain or defend. It failed,

¹⁹Ellingson testified that in April 1940 he had reprimanded Lytle for being careless about flagging crossings. Groseclose testified that about two weeks before Lytle was discharged, Lytle told him that he had been reprimanded by Ellingson for not flagging crossings. Lytle denied that he had been so reprimanded and further denied that he ever told Groseclose that he had been. It appears and we find that the incident which gave rise to the alleged reprimand concerned, not Lytle's failure to flag a crossing, but his responsibility in the matter of a "run-away engine."

moreover, to consult Corrigan, the engineer, concerning the incident.

Aspects of Ellingson's behavior on the morning of May 21, when the violation occurred, and in his later handling of the matter, also support the inference that Lytle and Reece were subjected to treatment such as the respondent would not normally have accorded employees caught in a similar dereliction of duty. Ellingson's testimony was that on that morning he had started on a trip involving ordinary business operations; that he never went out for the specific purpose of checking on the conduct of employees; but that when he traveled from camp to camp in the usual course of business he made it a point to observe the conduct of the men operating the trains. Ellingson specifically denied that he had gone out for the purpose of trailing Lytle and Reece. All this testimony, however, is inconsistent with Ellingson's action in abandoning his trip and returning to Railroad Camp, immediately upon his observation of the infraction, for the purpose of arranging that the two men should be laid off. In this connection we note that Lytle testified that shortly after the lay-off Ellingson told him that "Mr." Polson has instructed Ellingson to observe the Axford Prairie crossing on the morning of the 21st. Upon the entire record, including the respondent's attitude of opposition to the organization of its railroad employees in the Trainmen, and Ellingson's quick return to the Railroad Camp after noting the failure to flag, we believe

Lytle.²⁰ We find that Ellingson made the statement attributed to him, and find that he had been instructed by one of the Polsons to watch the Ax-ford Prairie crossing, on the morning of May 21, 1940. On the entire record we further find that pursuant to those instructions, Ellingson, contrary to his testimony, trailed the train to the crossing for the specific purpose of noting whether or not the two brakemen would observe the safety rule in question.

Explanation for the unusually severe treatment thus accorded Lytle and Reece, we are convinced, lies in the respondent's resentment of their activity in behalf of the Trainmen. We have noted that in the weeks preceding the negotiating conference of May 18, supervisory officials expressed the respondent's opposition to the Brotherhoods.²¹ At that conference, too, Arnold Polson clearly reiterated that opposition. Lytle was a leader in the organization of the Brotherhoods, and Reece, though somewhat less active, was closely associated in such activity with Lytle. Both were officers and both were members of the negotiating committee at the May 18 conference. Their discharges, under the unusual circumstances which we have outlined, followed that conference by 3 days.

²⁰Neither Polson denied having given the alleged instruction. We consider Ellingson's denial that he had gone out for the purpose of trailing Lytle and Reece as a denial of Lytle's testimony, but we do not credit it.

²¹Section III B, *supra*.

We find, as did the Trial Examiner, that by discharging and refusing to reinstate Lytle and Reece, the respondent has discriminated in regard to their hire and tenure of employment, thereby discouraging membership in the Union, and that by such action the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of the respondent, set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the respondent has engaged in unfair labor practices we shall order the respondent to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

We have found that the respondent, by discharging and refusing to reinstate Dave Lytle and Clayton Reece, discriminated in regard to their hire and tenure of employment. We shall, therefore, order the respondent to offer each of them immediate and full reinstatement to his former or a substantially

equivalent position without prejudice to his seniority or other rights and privileges, and to make each of them whole for any loss of pay he may have suffered by reason of the respondent's discrimination against him, by payment to him of a sum of money equal to the amount which he would normally have earned as wages from May 21, 1940, the date of the discharge, to the date of the respondent's offer of reinstatement, less his net earnings²² during said period.

Since the respondent's acts of discrimination "go to the very heart of the Act,"²³ and since, as we have found, the respondent also engaged in other unfair labor practices, we shall require the respondent to cease and desist from interfering with, restraining, or coercing its employees in the exercise

²²By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See *Matter of Crossett Lumber Company and United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers Union, Local 2590*, 8 N.L.R.B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. See *Republic Steel Corporation v. N.L.R.B.* 311 U.S. 7.

²³See *N.L.R.B. v. Entwistle Manufacturing Company*, 120 F. (2d) 532.

of the rights guaranteed in the Act, by discrimination, or in any other manner.²⁴

Upon the basis of the above findings of fact and upon the entire record in the case, the Board makes the following:

CONCLUSIONS OF LAW

1. Brotherhood of Railroad Trainmen is a labor organization, within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of Dave Lytle and Clayton Reece, and thereby discouraging membership in the Brotherhood of Railroad Trainmen, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices, affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

²⁴Cf. *N.L.R.B. v. Express Publishing Co.*, 61 S. Ct. 693.

ORDER

Upon the basis of the above findings of fact and conclusions of law and upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Polson Logging Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Discouraging membership in the Brotherhood of Railroad Trainmen, or any other labor organization of its employees, by discharging, laying off, or refusing to reinstate any of its employees, or in any other manner discriminating in regard to their hire or tenure of employment or any terms or conditions of employment;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Dave Lytle and Clayton Reece, immediate and full reinstatement to their former or substantially equivalent positions, without preju-

dice to their seniority or other rights or privileges;

(b) Make whole the said Dave Lytle and Clayton Reece for any loss of earnings resulting from the respondent's discrimination against them by payment to each of them of a sum of money equal to that which he would normally have earned as wages from May 21, 1940, to the date of the respondent's offer of reinstatement, less his net earnings during said period;

(c) Immediately post notices in conspicuous places throughout its lumber camps in the vicinity of Hoquiam, Washington, and maintain such notices for a period of at least sixty (60) consecutive days stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraph 1(a) and (b) of this Order; (2) that respondent will take the affirmative action set forth in paragraph 2 (a) and (b) of this Order; and (3) that the respondent's employees are free to become or remain members of the Brotherhood of Railroad Trainmen and that the respondent will not discriminate against any employee because of membership in or activities on behalf of that organization;

(d) Notify the Regional Director for the Nineteenth Region in writing within ten (10) days from the receipt of this Order what steps the respondent has taken to comply herewith.

Signed at Washington, D. C., this 20th day of April 1942.

[Seal]

HARRY A. MILLIS,

Chairman.

WM. M. LEISERSON,

Member.

GERARD D. REILLY,

Member,

National Labor Relations
Board.

In the United States Circuit Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

POLSON LOGGING COMPANY,
Respondent.

PETITION FOR ENFORCEMENT OF AN OR-
DER OF THE NATIONAL LABOR RELA-
TIONS BOARD.

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant
to the National Labor Relations Act (Act of July
5, 1935, 49 Stat. 449, c. 372, 29 U.S.C. § 151 et seq.),
respectfully petitions this Court for the enforce-
ment of its order against respondent, Polson Log-

ging Company, its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of Polson Logging Company and Brotherhood of Railroad Trainmen, Case No. C-2046."

In support of this petition, the Board respectfully shows:

(1) Respondent is a Washington corporation, engaged in business in the State of Washington, within this judicial circuit, where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, and including, without limitation, complaint and notice of hearing, respondent's answer to complaint, hearing for the purpose of taking testimony and receiving other evidence, stipulation for corrections in transcript, Intermediate Report, respondent's exceptions thereto, order transferring case to the Board, and oral argument before the Board, the Board, on April 20, 1942, duly stated its findings of fact, conclusions of law and issued an order directed to the respondent, its officers, agents, successors, and assigns. The aforesaid order provides as follows:

ORDER

Upon the basis of the above findings of fact and conclusions of law and upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Polson Logging Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Discouraging membership in the Brotherhood of Railroad Trainmen, or any other labor organization of its employees, by discharging, laying off, or refusing to reinstate any of its employees, or in any other manner discriminating in regard to their hire or tenure of employment or any terms or conditions of employment;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Dave Lytle and Clayton Reece, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges;

(b) Make whole the said Dave Lytle and Clayton Reece for any loss of earnings resulting from the respondent's discrimination against them by payment to each of them of a sum of money equal to that which he would normally have earned as wages from May 21, 1940, to the date of the respondent's offer of reinstatement, less his net earnings during said period;

(c) Immediately post notices in conspicuous places throughout its lumber camps in the vicinity of Hoquiam, Washington, and maintain such notices for a period of at least sixty (60) consecutive days stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraph 1 (a) and (b) of this Order; (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) and (b) of this Order; and (3) that the respondent's employees are free to become or remain members of the Brotherhood of Railroad Trainmen and that the respondent will not discriminate against any employees because of membership in or activities on behalf of that organization;

(d) Notify the Regional Director for the

Nineteenth Region in writing within ten (10) days from the receipt of this Order what steps the respondent has taken to comply herewith.

(3) On April 20, 1942, the Board's decision and order was served upon respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Robert W. Maxwell, Esquire, respondent's attorney in Seattle, Washington.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, the Board is certifying and filing with this Court a transcript of the entire record in the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony and evidence and the proceedings set forth in the transcript, and the order made thereupon set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board and requiring respondent, its officers, agents, successors, and assigns to comply therewith.

NATIONAL LABOR
RELATIONS BOARD

By ERNEST A. GROSS

Associate General Counsel

Dated at Washington, D. C. this 4th day of January, 1943.

(Duly Verified.)

[Endorsed]: Filed Jan. 11, 1943. Paul P. O'Brien, Clerk.

ORDER TO SHOW CAUSE

CCA No. 10342.

Received Jan. 14, 1943, U. S. Marshal.

United States of America, ss:

The President of the United States of America to Polson Logging Company, Attention, Mr. F. A. Polson, Hoquiam, Washington, and Brotherhood of Railroad Trainmen, Attention, S. C. Phillips, 820 Superior Avenue, Cleveland (W), Ohio.

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each of you are hereby notified that on the 11th day of January, 1943, a petition of the National Labor Relations Board for enforcement of its order entered on April 20, 1942, in a proceeding known upon the records of the said Board as "In the Matter of Polson Logging Company and Brotherhood of Railroad Trainmen, Case No. C-2046." and for entry of a decree by the United States Circuit Court of Appeals for the Ninth Circuit, was filed in the said

United States Circuit Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Circuit Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Harlan Fiske Stone, Chief Justice of the United States, this 11th day of January, in the year of our Lord one thousand nine hundred and forty-three.

[Seal] PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

MARSHAL'S RETURN

I hereby certify and return that I received the within writ at Tacoma, Washington, on the 14th day of January, 1943, and thereafter, on the 27th day of January, 1943, I served same upon the Polson Logging Company, a corporation, by handing to and leaving true and correct copies thereof, together with copy of Petition for Enforcement, with F. A. Polson, president of said corporation, at the office of the corporation at Hoquiam.

H. W. ALGEO, United States
Marshal, Western District
of Washington,

By E. M. BANNON,
Deputy.

Washington.

Marshal's Fees:

Travel ----- \$5.04

Service ----- 2.00

Total ----- \$7.04

[Endorsed]: Filed Feb. 1, 1943. Paul P.
O'Brien, Clerk.

United States of America
Before The National Labor Relations Board
Nineteenth Region.

Case No.
XIX-C-685

In the matter of

POLSON LOGGING COMPANY

and

BROTHERHOOD OF RAILROAD TRAINMEN

TESTIMONY

City Council Chambers
Hoquiam, Washington,
July 28, 1941.

The above-entitled matter came on for hearing at
10:00 a. m., pursuant to notice, as follows:

Before: Henry J. Kent, Trial Examiner.

Appearances:

Patrick H. Walker, 407 U. S. Court House, Seattle, Washington, appearing for the National Labor Relations Board.

Robert W. Maxwell, 354 Stuart Building, Seattle, Washington, appearing for respondent.

C. W. Stevens, 43 Rose Friend Apartments, Portland, Oregon, appearing for Brotherhood of Railroad Trainmen. [1*]

BOARD'S EXHIBIT No. 2

United States of America
Before The National Labor Relations Board
Nineteenth Region
Case No. XIX-C-685

In the Matter of

POLSON LOGGING COMPANY

and

BROTHERHOOD OF RAILROAD TRAINMEN

STIPULATION

This stipulation made and entered into by and between Polson Logging Company a corporation, by and through its attorney R. W. Maxwell, Brotherhood of Railroad Trainmen, by and through its

*Page numbering appearing at top of page of original Reporter's Transcript.

representative C. W. Stevens, and Patrick H. Walker, attorney for the National Labor Relations Board, Nineteenth Region.

Witnesseth:

Whereas upon charges and amended charges duly filed by the Brotherhood of Railroad Trainmen, the National Labor Relations Board by the Regional Director for the Nineteenth Region, acting pursuant to authority granted in Section 10 (b) of the National Labor Relations Act, (49 Stat. 449), and its Rules and Regulations, Series 2, as amended, Article IV, Section 1, issued its complaint on the 30th day of June, 1941, against the respondent herein.

Now Therefore, it is stipulated, admitted, and agreed as follows:

I.

That the following statement of facts may be received in evidence in a hearing to be conducted by the National Labor Relations Board in the above-entitled matter, the same to have the full force and effect as if such facts had been testified to by competent witnesses at said hearing. This stipulation shall not prejudice the right of any party to the proceeding or the said Board to introduce any further or additional testimony.

II.

That the respondent is a corporation duly organized and existing by virtue of the laws of the State of Washington, and its principal place of

business is in Hoquiam, Washington. The respondent is engaged in logging and sawmill operations at Hoquiam, Washington.

III.

During 1939 the company produced approximately 98,000,000 board feet of logs, about 64,000,000 feet of which were used in its own mill and the balance sold to sawmills within the State of Washington. Of the lumber produced by the Company's sawmill, approximately 90 per cent is sold and moved in interstate commerce. In connection with and as a part of its logging operations, the company operates a railroad system for the transportation of the logs from the woods to tidewater. The trains run over approximately 45 miles of railroad. The company employs approximately 500 employees in its logging operations, approximately 33 of whom are engaged in the operation of the company's railroad equipment over its railroad system.

IV.

Brotherhood of Railroad Trainmen is a labor organization within the meaning of Section 2, subsection 5, of the Act, admitting to membership all trainmen employed by the company.

V.

The respondent is engaged in commerce and in business affecting interstate commerce within the meaning of the Act and decisions of the Supreme Court thereunder.

Dated and Signed this . . . day of July, 1941.

POLSON LOGGING COMPANY

By R. W. MAXWELL,
its attorney.

BROTHERHOOD OF
RAILROAD TRAINMEN

By C. W. STEVENS
its representative.

PATRICK H. WALKER,
Attorney, National Labor
Relations Board,
Nineteenth Region.

F. A. POLSON

called as a witness by and on behalf of the Board,
being first duly sworn, was examined and testified
as follows:

Direct Examination

Q. (By Mr. Walker:) Your name is F. A.
Polson? A. Yes, sir.

Q. You reside at Hoquiam, Washington, do you?
A. Yes.

Q. You are the general manager of the Polson
Logging Company? A. Yes.

Q. And have been in excess of ten years?
A. Not quite that long.

Q. Well, in your capacity as general manager,
do you have certain subordinate supervisory per-
sonnel under you? A. Yes.

(Testimony of F. A. Polson.)

Q. Is Mr. Bennett Ellingson one? [10]

A. Yes.

Q. What is his position with the company?

A. He has certain duties— He is in charge of the operation of the trains, the picking up and laying of steel, and other duties.

Q. Did he hold such a position in May of 1940?

A. Yes.

Q. And were his duties the same as you have now indicated, at that time?

A. Generally, yes.

Q. What was the extent of his authority, if any, during May, 1940?

A. He had charge of certain operations, in a supervisory capacity; he had charge of those operations that I mentioned, in a supervisory capacity.

Q. That is, he directed the work done in that particular phase of the operation and had charge of the personnel of that phase?

A. He himself or through his subordinates.

Q. Did he have authority to hire and fire?

A. Yes.

Q. Now, did you also, in May, 1940, have some subordinates in other phases of the operation?

A. Yes.

Q. For instance, several logging camps? [11]

A. Yes.

Q. (By Mr. Walker:) When I asked you this question if the individuals in a supervisory capacity at the logging camp were subordinate to you,

(Testimony of F. A. Polson.)

that is just what I meant; I meant to you and not to Mr. Ellingson.

A. Some were subordinate to me, and some were subordinate to Mr. Ellingson.

Q. What is the title by which the supervisory personnel at the logging camps are known?

A. There is a general superintendent.

Q. That is Mr. A. M. Polson?

A. That is A. M. Polson. And then we have John F. Baker, in charge of the bucking and felling.

Q. At each one of the camps?

A. No, we have one over all the camps; and then we have Mr. Ellingson in charge of the duties mentioned; and then there are underneath the different ones.

Q. Do you generally have a foreman at each camp? A. Yes.

Q. In May, 1940, were several foremen at the several logging camps,—Was there an employe at the several logging camps of [12] a supervisory nature?

A. I don't quite understand your question.

Q. In May, 1940, were there foremen at the several logging camps,—supervisory individuals?

A. Yes.

Q. And what was the extent of the authority of such foremen at the camps?

A. Well, that is limited, according to the nature of their work; and also, their experience; it may or may not be equal among them all.

(Testimony of F. A. Polson.)

Q. Were the foremen in the several camps in May, 1940, individuals who had the power to hire and fire?

A. Yes; that is, in accordance with company regulations.

Q. Now, in May, 1940, Mr. Polson, who had charge of the labor relations for the Polson Logging Company?

A. Well, Mr. Ellingson and myself.

Q. The two of you?

A. Yes. That is a general question, and if there is anything particular that you want to bring out, I would like to have it a little more specific.

Q. What were your duties as a labor relations man for the company in May of 1940?

A. Well, to meet with committees and give consideration to various matters, anything for the betterment of conditions; along those lines. [13]

Q. Did your duties entail meeting with negotiating committees and grievance committees?

A. Yes.

Q. Were the grievance committees and negotiating committees representing your employees, employees of the Polson Logging Company?

A. Yes; there might have been others added to that at different times.

Q. (By Mr. Walker:) Mr. Polson, I hand you what has been marked as Board's Exhibit 3 for identification, and ask you if that is a carbon copy of a letter prepared by you (handing document to the witness)?

(Testimony of F. A. Polson.)

A. I don't know whether that is an exact copy or not.

Mr. Maxwell: It was made up in your office?

Mr. Walker: That is right.

Mr. Maxwell: That is not an exact copy.

Mr. Walker: It does not have the heading "Polson Logging Company," but the content is the same. Mr. Examiner, we are substituting a copy which was just handed me by Mr. Maxwell, for the copy which was marked, and I ask that a substitute marking be made, marking this copy that I now have in my hand as Board's Exhibit 3. It is the same, identically, with the [14] exception of the heading.

Trial Examiner Kent: That may be done.

Mr. Walker: Will you read the question, please?

(Thereupon, the last question was read aloud by the reporter as above recorded.)

A. Yes.

Q. (By Mr. Walker:) Mr. Polson, I hand you what has been marked as Board's Exhibit 4 for identification and ask you if that is a carbon copy of a letter?

A. It has a notation, "No. 1"; it is not a carbon copy of the letter received by me, but is apparently a copy.

Q. Mr. Polson, in lieu of the carbon copy, or what was received as the carbon copy, which was marked as Board's Exhibit 4, I now hand you an instrument which I will ask the reporter to mark

(Testimony of F. A. Polson.)

Board's Exhibit 4 in lieu of the other one originally marked; I will ask you what that is.

A. That is a communication received by me.

Q. When was it received by you?

A. I couldn't tell you.

Q. Where was it received by you?

A. It was given to me in the office of the Polson Logging Company. [15]

Q. By whom?

A. I don't know who presented it; it was presented by a committee.

Q. Who composed the committee?

A. Well, according to this, Mr. Lytle and Mr. Key—Mr. Sam Key,—were members of the committee.

Q. Was anybody else present? A. Yes.

Q. Who?

A. I would have to refresh myself on that.

Q. Does it refresh your recollection that Mr. A. M. Polson, Mr. Bennett Ellingson, and Mr. Clayton Reece, and Mr. Lawrence Brant were also there?

A. I believe they were present, and I believe there were perhaps some others present.

Q. Somebody else representing or appearing on behalf of the company?

A. No; someone else on the committee. I may be mistaken.

Q. Were they individuals who represented,—
Mr. Stevens: May we go off the record?

Trial Examiner Kent: Off the record.

(Discussion off the record.)

(Testimony of F. A. Polson.)

Trial Examiner Kent: On the record.

Q. (By Mr. Walker:) Were all the individuals present at the meeting who represented the Brotherhood employees of the Polson [16] Logging Company?

A. The committee was composed of employees of the Polson Logging Company.

Q. Was Mr. W. J. Williams at the meeting? If you recall?

A. I believe he was.

Q. Was what has been marked as Board's Exhibit 3 an answer prepared by you to Board's Exhibit 4?

A. Yes.

Mr. Walker: I offer in evidence, Mr. Examiner, what has been marked as Board's Exhibits 3 and 4, together with the duplicates thereof.

Trial Examiner Kent: They may be admitted.

(Whereupon, the documents heretofore marked for identification as Board's Exhibits 3 and 4, were received in evidence.)

(Testimony of F. A. Polson.)

BOARD'S EXHIBIT NO. 3

Copy

May 29, 1940

Mr. Dave Lytle, Chairman,
Brotherhood of Railroad Trainmen's General
Grievance Committee,
349 Cottage Street,
Hoquiam, Washington.

Mr. Sam Key, Chairman,
Brotherhood of Locomotive Firemen and
Enginemen's General Grievance Committee,
Box 193-B, Star Route #1,
Hoquiam, Washington.

Gentlemen:

We have for acknowledgment your recent communication addressed to Mr. Arnold Polson, General Manager, Polson Logging Company and Ozette Railway Company. Your communication reads as follows:

“A majority of the Conductors and Brakemen and the Engineers and Firemen working in your train service have designated the Brotherhood of Railroad Trainmen and the Brotherhood of Locomotive Firemen and Enginemen, respectively, as their representatives in collective bargaining under The National Labor Relations Act and you are therefore requested to sign the attached Agreement with the Chairmen and Secretaries of the General Grievance Committees of the B. R. T. and B. L. F. and E.”

(Testimony of F. A. Polson.)

We received attached to your communication a proposed agreement, intended to be signed between our company and the two Brotherhoods, and to cover the railway logging department service employees of either or both the Polson Logging Company and the Ozette Railway Company.

Please be informed that the Polson Logging Company has had an agreement with Local No. 2, I.W.A., headquarters Aberdeen, Washington, for a number of years, and that under the terms of this agreement, as negotiated from time to time, we have and still recognize Local No. 2, I.W.A., as the exclusive bargaining agency for all the employees in this company's logging operations.

It is our understanding of the National Labor Relations Act that where a majority of a company's employees have designated a particular union as their collective bargaining agency, that the company could not recognize any other union as the bargaining agent for any of its employees, unless with the approval of the union having the bargaining rights, or through action of the National Labor Relations Board.

So that the record may be clear, we are sending a copy of this letter to Local No. 2 I.W.A., at Aberdeen.

Very truly yours,

POLSON LUMBER COMPANY

F. A. Polson, Manager

FAP:jt

(Testimony of F. A. Polson.)

BOARD'S EXHIBIT NO. 4

Hoquiam, Washington,
1940.

Mr. Arnold Polson, General Manager,
Polson Logging Company and
Ozette Railway Company,
Hoquiam, Wash.

Dear Sir:

A majority of the Conductors and Brakemen and the Engineers and Firemen working in your train service have designated the Brotherhood of Railroad Trainmen and the Brotherhood of Locomotive Firemen and Enginemen, respectively, as their representatives in collective bargaining under The National Labor Relations Act, and you are therefore requested to sign the attached Agreement with the Chairmen and Secretaries of the General Grievance Committees of the B. R. T. and B. L. F. & E.

Truly yours,

DAVE LYTTLE

Chairman, Brotherhood of Railroad Trainmen's General Grievance Committee, 349 Cottage St., Hoquiam, Wash.

SAM KEY

Chairman, Brotherhood of Locomotive Firemen and Enginemen's General Grievance Committee. Box 193-B, Star Route #1, Hoquiam, Wash.

(Testimony of F. A. Polson.)

Board's Exhibit No. 4—(Continued)

AGREEMENT

It is mutually understood and agreed by and between the Polson Logging Company and/or Ozette Railway Company, and its logging Department train service employees, represented by the Brotherhood of Railroad Trainmen and the Brotherhood of Locomotive Firemen and Enginemen, respectively, that the following rules and regulations covering rates of pay, hours of employment and working conditions of all Conductors and Brakemen and all Engineers and Firemen in the employ of the logging department of the Polson Logging Company and/or Ozette Railway Company, shall be in effect on and after the . . . day of, 1940, continuing until such time as this Agreement is amended or terminated by the parties hereto as provided for in Article XVII hereinafter set forth.

The term "Company" as used in this Agreement means the Polson Logging Company and/or Ozette Railway Company; the term "Trainmen" used in this Agreement means both Conductors and Brakemen; the term "Enginemen" used in this Agreement means both Locomotive Engineers and Firemen.

ARTICLE I

Rates of Pay:

(a) Rates of pay shown below shall govern for the class of service designated.

(Testimony of F. A. Polson.)

Board's Exhibit No. 4—(Continued)

	Rate Per Day	Pro Rata Hourly Rate	Time and One- Half Overtime Hourly Rate
Engineers	\$8.40	\$1.05	\$1.575
Firemen	6.80	.85	1.275
Conductors	8.00	1.00	1.50
Brakemen	7.20	.90	1.35

(b) Any Engineman required to hostile his engine before and/or after work day shall be allowed two (2) hours pay at his regular rate.

(c) In the event Diesel Electric, Oil Electric, Gas Electric, Electric Locomotive or other power is installed as a substitute for steam on the Company's logging railroad, an Engineer from the seniority list of Engineers and a Fireman from the seniority list of Firemen shall be employed on all such power used in woods and/or main line service; rates of pay to remain as on steam locomotives. This will not apply to speeder equipment.

ARTICLE II

Regular Hours and Overtime:

(a) Eight (8) hours or less on duty shall constitute a day's work for Trainmen and Enginemen coming under the provisions of this Agreement. Time after eight (8) hours on duty in a twenty-four (24) hour period shall be paid for on a minute basis at the overtime hourly rate of rate and one-half. Trainmen and Enginemen coming under the provisions of this Agreement shall be guaranteed not less than forty (40) hours per week, with Monday being the first day of each week.

(Testimony of F. A. Polson.)

Board's Exhibit No. 4—(Continued)

(b) Trainmen or Enginemen called for service and not used shall be allowed two (2) hours time at their respective pro rata hourly rates.

(c) Trainmen will be placed on duty and be tied up as a unit.

ARTICLE III

Beginning and Ending of Day:

(a) Trainmen and Enginemen shall have a designated point for going on duty and a designated point for going off duty.

(b) Pay of Trainmen and Enginemen shall commence at the time they are required to report for duty and shall continue until relieved from duty.

ARTICLE IV

Runarounds:

(a) Available senior Trainmen and Enginemen who are not regularly assigned as such shall be called to fill vacancies in regular service and to man unassigned service for Trainmen and Enginemen at least one and one-half (1½) hours before time required to report for duty, or as near thereto as practicable.

(b) Senior available Conductors and/or Brakemen and Engineers and/or Firemen who are not regularly assigned as such at the point in woods where vacancy or unassigned service for Conductor and/or Brakeman or Engineer and/or Fireman is to be manned, not called in turn, through no fault

(Testimony of F. A. Polson.)

Board's Exhibit No. 4—(Continued)

of their own and who are not used as Conductor and/or Brakeman or Engineer and/or Fireman, within twelve (12) hours from the time runaround, shall receive four (4) hours' pay, and if not used as Conductor and/or Brakeman or Engineer and/or Fireman within twenty-four (24) hours from the time runaround, shall be paid eight (8) hours' pay. Senior available Conductors and/or Brakemen and Engineers and/or Firemen who are not regularly assigned as such in main line service at Railroad Camp, or in main line or woods service, not called in turn through no fault of their own and who are not used as Conductors and/or Brakemen or Engineers and/or Firemen, within twelve (12) hours from time runaround, shall receive four (4) hours' pay, and if not used as Conductor and/or Brakeman or Engineer and/or Fireman within twenty-four (24) hours from the time runaround, shall be paid eight (8) hours' pay.

ARTICLE V

Deadheading:

(a) Trainmen and/or Enginemen deadheading to an assignment and not used within twelve (12) hours of time crew is due to go on duty shall be allowed four (4) hours' pay; and if not used within twenty-four (24) hours, shall be allowed eight (8) hours' pay.

(b) Trainmen and/or Enginemen deadheading at the instance of the Company shall be furnished transportation by the Company.

(Testimony of F. A. Polson.)

Board's Exhibit No. 4—(Continued)

ARTICLE VI

Seniority and Rights:

(a) Rights of Trainmen and Enginemen to preference of runs in their respective classes shall be governed by seniority. Seniority of Trainmen and Enginemen shall date from the first day of service with the Company.

(b) The status of Trainmen and Enginemen employed at the time of this Agreement shall remain unchanged except when future vacancies occur, at which time they will be filled in accordance with Paragraph (a) of this Article. The seniority list as at present carried by the Company will be officially accepted, subject to the approval of the Committees, with the understanding that each hired Engineer will have a seniority date as Fireman concurrent with his seniority date as Engineer and that Firemen failing in or refusing to take promotion as Engineers will rank on the Firemen's seniority list in their respective order as Firemen immediately behind the junior Engineer, but will remain senior to all Firemen their junior unless and until such junior Firemen become Engineers. It is further understood that each hired Conductor will have a seniority date as Brakeman concurrent with his seniority date as Conductor.

(c) A regular run or shift will be bulletined for seniority choice and the qualified senior bidder in each class will be assigned, provided, when it is

(Testimony of F. A. Polson.)

Board's Exhibit No. 4—(Continued)

known a new run going on is for five (5) days or longer, it shall be bulletined in advance and the senior applicant will be assigned at the time the service is instituted. All new or vacant runs will be bulletined for five (5) days, and if no bids are received, the junior qualified men will be assigned.

(d) Bulletins advertising runs will be posted on the Bulletin Board at the Dispatcher's Office at Headquarters Camp.

(e) Seniority of Trainmen shall be limited to their rights as Conductors and/or Brakemen, and seniority of Enginemen shall be limited to their rights as Engineers and/or Firemen.

(f) Temporary vacancies in regular service and in unassigned service will be filled as provided for in Article IV of this Agreement, but after a vacancy in regular service has existed for five (5) days or longer, the senior applicant applying for such vacancy shall be assigned thereto.

(g) All trains and locomotives shall be handled by available senior Trainmen and Enginemen.

ARTICLE VII

Time Slips and Limitation on Claims:

(a) Conductors shall file all time slips for the crews. Trainmen and/or Enginemen working alone shall make out their own time slips. In case of dispute as to proper allowance of time, Trainmen and Enginemen will be notified by the Timekeeper within five (5) days after time slips are received giving

(Testimony of F. A. Polson.)

Board's Exhibit No. 4—(Continued)

reasons for any and all disallowances. In cases where shortages appear after the employee has received his check covering services during the payroll period, and such shortages are verified, a voucher shall be issued in all cases where the shortage exceeds Five Dollars (\$5.00). If less than Five Dollars (\$5.00), it shall be allowed on the next payroll.

(b) All claims, of any character, arising by reason of alleged violation of any of the provisions of this Agreement must be presented to the Company within thirty (30) days from date of such violation or within thirty (30) days from the earliest date complainant could have had knowledge of same, and if not so presented, the Company shall not be liable for any penalty, remuneration or additional compensation covering the period prior to the date the claim is presented to the management.

ARTICLE VIII

Attending Court:

Trainmen and/or Enginemen attending court or inquests under instructions from the Company will be paid the same compensation they would have earned had they remained on their regular assignment, plus fair living expenses when away from home, and under these circumstances the Company will receive the witness fees.

(Testimony of F. A. Polson.)

Board's Exhibit No. 4—(Continued)

ARTICLE IX

Increasing Forces — Decreasing Forces — Promotions:

(a) When reductions in forces are made, they shall be in the reverse order of seniority.

(b) Brakemen holding seniority as such with the Company will be promoted to Conductors, and Firemen holding seniority as such with the Company will be promoted to Engineers, before other Conductors or Engineers are hired. Seniority and competency shall be the governing factors in promotion. The Company shall be the judge of competency.

ARTICLE X

Company Tieups:

Regular assigned crews will be tied up at a designated point. Other crews will be notified in advance as to point they will be tied up for the day.

ARTICLE XI

Eating:

No deduction shall be made for time consumed by crews for meals while they are on duty. If called for service before meals are served, they shall be fed at the first available place, and if boarding in camp will not be required to work without having a hot meal before going on duty and after being tied up.

(Testimony of F. A. Polson.)

Board's Exhibit No. 4—(Continued)

ARTICLE XII

Train Crew Limit:

(a) All trains of twenty-five (25) cars or less shall require not less than one (1) Conductor and one (1) Brakeman. Trains of more than twenty-five (25) cars shall require one (1) Conductor and two (2) Brakemen.

(b) Gravel trains shall require not less than two (2) trainmen, one of whom must be a Conductor.

(c) Train crews required to unload logs from cars equipped with top chains, shall have the services of a chain man, in addition to the regular train crew.

ARTICLE XIII

Investigations:

(a) Trainmen or Enginemen suspended or dismissed from service will, upon their request, be granted a thorough investigation by the proper official of the Company. Such request must be made within two (2) days after such suspension or discharge. Such investigation shall be held by the proper official of the Company within five (5) days after it has been brought to his attention and shall proceed with as little interruption as possible until completed.

(b) An employee being investigated may have the benefit of a representative of his own selection if he so desires.

(c) When transcript of testimony is taken at an

(Testimony of F. A. Polson.)

Board's Exhibit No. 4—(Continued)

investigation General Chairmen will be furnished copy of same if requested.

(d) When a decision is rendered which the employee believes to be unjust, he may take up his case on appeal to the next higher official, which appeal must be made within fifteen (15) days. If the suspension or dismissal is proven to have been without just cause, the employee will be reinstated and paid for all time lost.

ARTICLE XIV

Leave of Absence:

(a) Upon application, Trainmen and Enginemen may be granted reasonable leaves of absence provided that in the opinion of the Company their work can be carried on during the absent period. Such leaves of absence shall be limited to thirty (30) days except in case of injury or sickness. Such leaves of absence may be renewed at their expiration, if mutually agreeable.

(b) Any Trainman or Engineman having been granted leave of absence, who shall engage in other employment while on such leave or fail to report for duty and return to service at the expiration of said leave of absence, shall lose his seniority rights and privileges previously held. This rule shall not apply when laid off account reduction in force unless the employee fails to report to the Company for reemployment on proper notice by United States

(Testimony of F. A. Polson.)

Board's Exhibit No. 4—(Continued)

Registered Mail, except when prevented from doing so because of sickness or disability.

(d) Trainmen or Enginemen on the General Grievance Committees of their Organizations shall upon request be granted leave of absence to serve on such Committees when dealing with the Company.

(d) Trainmen or Enginemen accepting official positions with the Company or the Brotherhood of Railroad Trainmen or the Brotherhood of Locomotive Firemen and Enginemen, parties to this Agreement, shall retain seniority rights unimpaired.

ARTICLE XV

Service Letters:

Any Trainman or Engineman, upon request, shall be given a service letter by the Company at the time of his leaving the service. Such letter shall state the capacity in which employed together with the cause for leaving.

ARTICLE XVI

Adjustments of Grievances:

(a) The General Grievance Committee of the Brotherhood of Railroad Trainmen shall consist of train employees of the Company and shall represent all Conductors and Brakemen employed by the Company in its Logging Department; and the General Grievance Committee of the Brotherhood of Locomotive Firemen and Enginemen shall consist of engine employees of the Company and shall repre-

(Testimony of F. A. Polson.)

Board's Exhibit No. 4—(Continued)

sent all Locomotive Engineers and Firemen employed by the Company in its Logging Department, in the making of Agreements and Contracts, rates, schedules, working conditions and interpretations thereof.

(b) All controversies affecting Conductors and Brakemen shall be handled in accordance with the interpretation of this Agreement as agreed upon between the General Grievance Committee of the Brotherhood of Railroad Trainmen and the Company, and any final settlement arrived at shall be binding upon the Company, the Brotherhood of Railroad Trainmen and the employee or employees involved.

(c) All controversies affecting Engineers and Firemen shall be handled in accordance with the interpretation of this Agreement as agreed upon between the General Grievance Committee of the Brotherhood of Locomotive Firemen and Engineers and the Company, and any final settlement arrived at shall be binding upon the Company; the Brotherhood of Locomotive Firemen and Engineers and the employee or employees involved.

ARTICLE XVII

Change, Withdrawal or Termination Clause:

Any party or parties to this Agreement, separately or jointly, desiring to change, withdraw from or terminate same, must serve at least thirty (30) days' written notice in advance by United States Regis-

(Testimony of F. A. Polson.)

Board's Exhibit No. 4—(Continued)

tered Mail on the party or parties hereto, and such written notice will contain the change or changes desired, or the intention to withdraw from or terminate same.

In witness whereof, the parties to this instrument have executed the same, by their officers and agents hereunto duly authorized.

POLSON LOGGING COMPANY
and/or OZETTE RAILWAY
COMPANY

By

Manager

BROTHERHOOD OF RAILROAD TRAINMEN

By.....

Chairman, General Grievance Committee

By.....

Secretary, General Grievance Committee

BROTHERHOOD OF LOCOMOTIVE FIRE-
MEN AND ENGINEMEN

By.....

Chairman, General Grievance Committee

By.....

Secretary, General Grievance Committee



Q. (Mr. Walker:) Now, following that meeting at which the committee appeared, a little later, did Mr. Reece and Mr. Lytle cease to be employees of the company? A. Yes. [17]

(Testimony of F. A. Polson.)

Q. (By Mr. Walker:) Mr. Polson, I hand you what has been marked as Board's Exhibit 5 and ask you what that is.

A. It is a separation report. I don't know whether it is exactly the same or not,——

Mr. Maxwell: Was that prepared in your office?

Mr. Walker: Yes.

Mr. Maxwell: From the state files?

Mr. Walker: Yes.

Mr. Maxwell: From the state file or from the company files?

Mr. Walker: The state files.

Mr. Maxwell: If that is an exact copy and it was made up in your office, I won't raise any objection on that; so I don't think it will be necessary to confuse the record.

The Witness: This particular one which you just handed me is a separation report of Clayton Reece.

Q. (By Mr. Walker:) Mr. Polson, what is the instrument which has been marked as Board's Exhibit 6 for identification?

Mr. Maxwell: The same is true of that one, Mr. Walker?

Mr. Walker: Yes.

A. That is a separation report of David Lytle.

Q. Did the employees Lytle and Reece cease their employment [19] on the date indicated on the instruments? A. I believe they did.

Trial Examiner Kent: And what was that date?

Mr. Walker: May 21, 1940.

(Testimony of F. A. Polson.)

Q. (By Mr. Walker:) Are the reasons set forth in each of the exhibits the company's assigned reasons for discharge in each instance?

Mr. Maxwell: I will object to that on the ground that the instruments speak for themselves. They have been admitted without objection on the part of the company, the respondent herein. It purports to be a copy of the report of the employer for the purpose of filling out this report,—

Trial Examiner Kent: Reframe your question.

Q. (By Mr. Walker:) Who prepared Board's Exhibits 5 and 6?

A. These are your copies; you prepared them.

Mr. Maxwell: From the original?

Mr. Walker: Yes.

Q. (By Mr. Walker:) Who is Mr. Langabeer?

A. The accountant in charge of the payroll.

Q. Were Board's Exhibits 5 and 6 prepared under your direction? A. Yes.

Q. Did you tell Mr. Langabeer what to set out?

Mr. Maxwell: Miss Langabeer.

Q. (Continuing) Did you direct Mr. Langabeer as to what [20] reasons for discharge to set out on the separation report?

A. Yes. The name is Miss Langabeer, not Mr.

Q. Are you the person who decided that Mr. Reece and Mr. Lytle be discharged?

A. No.

Q. Who did?

A. It was after a study was made of it.

Q. By whom?

(Testimony of F. A. Polson.)

A. By Mr. Ellingson, Mr. A. M. Polson, and myself.

Q. When was that study made?

A. After,—I have not the exact date of it.

Q. It was after May 21?

A. It was made prior to the separation report,—the investigation. I believe that is correct.

Q. I call your attention to the date upon which the separation report was made out,—They were both made out on the same date. I call your attention to the dates upon which they were made out and signed. A. Yes.

Q. And I call your attention to the dates upon which Mr. Lytle and Mr. Reece were discharged.

A. Yes.

Q. When was the investigation made with respect to the discharges of Mr. Lytle and Mr. Reece?

A. It was made right after the time of the,—right after [21] the date on which the reasons were given in the separation report, occurred.

Q. I don't quite understand that.

A. The investigation was made after the occurrence that led to the discharge.

Q. That is, you mean to say, the investigation was made right after May 21, 1940?

A. I am not sure of my dates on this, but it was around that time.

Q. Well, about how long after May 21, did the investigation take place?

A. It was right after it was reported to me.

Q. What was reported to you?

(Testimony of F. A. Polson.)

A. This case.

Q. A report was made to you on Mr. Lytle and Mr. Reece? A. Yes.

Q. Who made the report?

A. Both Mr. Ellingson and Mr. Polson.

Q. Mr. A. M. Polson?

A. Yes, A. M. Polson?

Q. What did they report to you?

A. I didn't keep a record of the exact dates; it was right shortly afterwards.

Q. Where did they make the report?

A. It was right out at the camps. [22]

Q. Which camp?

A. Headquarters camp.

Q. That is also called railroad camp?

A. Yes, railroad camp.

Q. Now, did you study each individual's record from the report made to you, or each individual's case?

A. Mr. Ellingson told me about it.

Q. Was it the day following May 21 or two or three days after?

A. I couldn't say exactly.

Q. Well, it was along there somewhere?

A. It was in there very shortly.

Q. Now, when did the investigation take place?

A. It was out there.

Q. At camp? A. At camp.

Q. At railroad camp?

A. Yes, at railroad camp.

Q. And when did the investigation take place?

(Testimony of F. A. Polson.)

A. When?

Q. With respect to the time of the report made to you by Mr. Ellingson?

A. Your question is not clear; I am sorry.

Q. Within a period of a day or two, either the day following May 21 or two or three days afterwards Mr. Ellingson reported [23] to you at Railroad Camp, is that correct; did he report that incident at that time, two or three days after May 21?

A. Somewhere around in there. I am not sure of the date.

Q. You have also testified that an investigation was made by yourself, Mr. A. M. Polson, and Mr. Ellingson on this matter? A. Yes.

Q. When was that?

A. I don't know whether you would call it an investigation or an inquiry.

Q. When did you conduct the inquiry?

A. I asked questions.

Q. You conducted the inquiry?

A. Well, I asked questions.

Q. Of whom? A. Of Mr. Ellingson.

Q. Anybody else? A. No.

Q. And when did this inquiry, or your directing of questions to Mr. Ellingson, take place with respect to the time that Mr. Ellingson reported the incident to you?

A. When did it take place?

Q. Yes.

(Testimony of F. A. Polson.)

A. Your question is not clear.

Q. All right. Mr. Ellingson reported this incident concerning Reece and Lytle,—reported it to you out at Railroad Camp? A. Yes.

Q. And you have also testified that you asked some questions of Mr. Ellingson? A. Yes.

Q. Concerning this incident involving Lytle and Reece? A. Yes.

Q. When did you ask the questions of Mr. Ellingson or conduct your inquiry or your investigation, whatever you want to call it, with respect to the time when Mr. Ellingson reported the incident to you?

A. Why, I inquired right then.

Q. It all took place at the same time?

A. Yes.

Q. Who selected the reasons for the discharge of Mr. Clayton Reece and Mr. Lytle as are set out in Board's Exhibit 5 and 6?

Mr. Maxwell: I will object to that on the ground that it is repetitious. The form of the question is improper.

Trial Examiner Kent: Reframe your question.

Q. (By Mr. Walker:) Are you the only one who told Mr. Langabeer what to indicate on Board's Exhibits 5 and 6 as the reasons for the discharges of Mr. Reece and Mr. Lytle?

A. Yes. If I told them, it wouldn't be necessary for any- [25] body else. That is Miss Langabeer.

Q. You are the one that did tell her what to say? A. Yes. [26]

(Testimony of F. A. Polson.)

Q. (By Mr. Walker:) Mr. Polson, the safety rules provide for the safe operation of railroad property; is that correct?

A. And also the protection of the public.

Q. If there is involved unsafe operations that result in a violation of a safety rules; is that correct?

Mr. Maxwell: Just a moment. I will object to the form of the question on the ground that it is hypothetical.

Trial Examiner Kent: Read the question, Mr. Reporter.

Mr. Walker: That is agreeable with me if counsel will admit that the reasons assigned by the company are hypothetical.

Mr. Maxwell: Your question infers that. It is an improper question.

Trial Examiner Kent: Will you read the questions and answers, Mr. Reporter?

(Thereupon the questions and answers referred to were read as follows:)

“Question: Mr. Polson, the safety rules provide for the safe operation of railroad property; is that correct?”

“Answer: And also the protection of the public.

“Question: If there is involved unsafe operations that result in a violation of a safety rule; is that correct?”

Trial Examiner: Kent: Reframe your question.

(Testimony of F. A. Polson.)

Mr. Walker: Let me reframe that. [28]

Q. (By Mr. Walker:) If there is an unsafe operation of the railroad, that results in a violation of a safety rule; is that correct?

Mr. Maxwell: I will object to that as calling for a conclusion of the witness.

Trial Examiner Kent: Reframe your question.

Q. (By Mr. Walker:) Does unsafe operation of a railroad result in a violation of the safety rules?

Mr. Maxwell: I will object to the form of the question.

Trial Examiner Kent: The answer may be taken.

The Witness: Will you read the question, please?

(Thereupon, the pending question was read by the reporter as above recorded.)

A. Yes.

Q. Then, all in all, there is only one reason assigned by the company, and that is the violation of the safety rules; is that correct?

Mr. Maxwell: I will object to that as calling for a conclusion of the witness.

Trial Examiner Kent: Wait a minute.

Mr. Maxwell: It is also argumentative, Mr. Examiner.

Trial Examiner Kent: Read the question, Mr. Reporter.

(Testimony of F. A. Polson.)

(Thereupon, the pending question was read aloud by the reporter as above recorded.)

Trial Examiner Kent: The answer may be taken. I think your [29] objection can be covered by cross-examination afterwards.

A. The separation report gave the reasons for the discharge.

Mr. Walker: Will you read the question to the witness, Mr. Nelson?

(Thereupon, the question referred to was read aloud by the reporter as follows:)

“Question: Then, all in all, there is only one reason assigned by the company, and that is the violation of the safety rules; is that correct?”

A. I think the separation report covers that.

Mr. Maxwell: Mr. Examiner, may I interject a question. In the light of the question just asked and answered, that there is only one, do you mean that the company assigned for the immediate discharge this violation of the safety rules of May 21 by failure to flag the crossing in accordance with the safety rules?

Mr. Walker: Are you asking me?

Mr. Maxwell: Yes.

Mr. Walker: I don't know anything about it, I am trying to find out.

Mr. Maxwell: I want to get your meaning. I don't quite understand it myself.

Q. (By Mr. Walker:) Mr. Polson, it all comes

(Testimony of F. A. Polson.)

down to this, that the reason for the discharge of Mr. Lytle and Mr. Reece, as assigned by the company, is a violation of the safety rules; [30] is that correct?

Trial Examiner Kent: The answer may be taken.

A. The reasons given for the discharge were as in the separation report, a violation of the safety rules and/or unsafe operations.

Q. Yes, I can read, Mr. Polson.

Mr. Maxwell: Just a moment. That is improper.

Q. (By Mr. Walker:) But the use of the phrase, "and/or" is used in the report?

A. That is right.

Q. And the phrase, "and/or unsafe operations," is purely redundant,—

Mr. Maxwell: Just a moment.

Q. (Resumed) —excessive, and not necessary?

Mr. Maxwell: I will object to that as argumentative.

Trial Examiner Kent: At this meeting, at which Board's Exhibit 4 was delivered to you, who was the spokesman for the company? [31]

A. I was.

Q. Anybody else?

A. I believe I did most of the talking for the company.

Q. Were you the general manager of the Polson Logging Company in 1935? A. Yes.

(Testimony of F. A. Polson.)

Q. You recall an industry wide strike at that time?

Mr. Maxwell: I will object to that on the ground of immateriality, and as having no bearing on any issue in this case, and entirely too remote.

Trial Examiner Kent: When? In the 1935 strike? Was it 1935?

Mr. Walker: You are asking me?

Trial Examiner Kent: Yes.

Mr. Walker: Yes.

Trial Examiner Kent: What part of 1935? When?

Mr. Walker: It started on or about May 6, 1935, and concluded about August 14, 1935, I believe.

Trial Examiner Kent: The answer may be taken.

The Witness: Will you read the question, please?

(Thereupon, the last question was read aloud by the reporter as above recorded.)

A. When?

Q. (By Mr. Walker:) 1935?

A. Yes. [32]

Q. And did it begin on or about May 6, 1935; do you recall?

A. I don't recall the exact date it began.

Q. Were the operations of the Polson Logging Company—

Mr. Maxwell: (Interposing) May it be under-

(Testimony of F. A. Polson.)

stood that my objection goes to the entire line of questions?

Trial Examiner Kent: Yes.

Mr. Maxwell: Thank you.

Trial Examiner Kent: I might ask you a question. Was there any hearing concerning the present respondent arising out of the 1935 strike?

Mr. Walker: No, sir; there was not.

Trial Examiner Kent: It seems to me that this might be getting somewhat speculative; I think that would be a highly speculative matter to go into.

Mr. Walker: Well, I am not going to go far afield.

Trial Examiner Kent: If it is only a question or two, you may proceed, and I will entertain a motion to strike after the testimony is taken.

Q. (By Mr. Walker:) Were the operations of the Polson Logging Company involved?

A. To some extent.

Mr. Walker: I would like to have you mark this, Mr. Reporter, as Board's Exhibit No. 7.

(Whereupon, the document referred to was marked as Board's Exhibit No. 7, for identification.) [33]

Q. (By Mr. Walker): At the conclusion of the 1935 strike, was there a written instrument prepared? A. Yes.

Q. I hand you what has been marked as Board's Exhibit 7 for identification and ask you what this is.

A. I would say that that is along the general

(Testimony of F. A. Polson.)

lines of the settlement; whether it is the exact settlement, I don't know.

Q. Referring to Board's Exhibit 7, does it refresh your recollection that the 1935 strike began on or about May 6?

A. It began somewhere around that time; I don't know exactly when it did begin.

Q. And that it concluded on or about August 14, 1935?

A. It concluded about the middle of August.

Q. Now, did the Polson Logging Company post about its premises, instruments similar to or identical with Board's Exhibit 7 on or about the middle of August, 1935? A. I don't recall.

Q. Was the Polson Logging Company a party to the instrument, Board's Exhibit No. 7, along with other operators?

A. I can't identify this as being the exact settlement, but we made the same settlement as other operations did, generally.

Q. You made the same settlement?

A. Yes.

Mr. Walker: Will you mark this, Mr. Reporter, as Board's [34] Exhibit 7?

Q. (By Mr. Walker): Now, was there a labor dispute involving the Polson Logging Company in 1936? A. Yes, I believe there was.

Q. And did that conclude approximately on or about February 11, 1937?

A. It concluded in February.

(Testimony of F. A. Polson.)

Q. 1937? A. Yes.

Q. And at the conclusion of this dispute, were the terms of the same evidenced by a written instrument? A. Yes.

Q. Is what has been marked as Board's Exhibit 8 for identification a copy of the same?

A. I could not definitely identify that; it seems to be along the general lines.

Q. Between May 6, 1935, and February 11, 1937, were the employees of the company, who had membership in a labor organization, members of a local affiliated with the United Brotherhood of Carpenters and Joiners?

A. Will you reframe that question, please? [35]

Q. (By Mr. Walker): I mean, in the logging operations?

A. Well, I am not sure as to the nature or the extent of their affiliations.

Q. Were you so informed?

A. Well, it may have involved a switch at some time that I am not familiar with.

Q. I am just coming to that. Was the labor organization,—Strike that. Did your employees transfer their membership in the year 1937, and subsequent to February 11, 1937, become members of an organization known as the International Woodworkers of America?

A. There was a transfer; I don't know what the date of it was.

Q. Now, prior to the transfer were the logging

(Testimony of F. A. Polson.)

employees of the company in so far as you know, affiliated with the local chartered by the United Brotherhood of Carpenters and Joiners, an A. F. of L. affiliation?

A. I do not follow your question.

Mr. Maxwell: It is repetitious. The question has been answered once.

Trial Examiner Kent: The record may stand.

Q. (By Mr. Walker): Before the transfer to the I. W. A., were the logging employees, who had membership in a labor organization, so far as you know, members of a local chartered by the International Brotherhood of Carpenters and Joiners, an A. F. of L. organization? [36]

A. You mean, were they members of the A. F. of L. before they joined the C. I. O.? Is that the question?

Q. That is right. A. I believe so.

Q. Now, between August 14, 1935, and February 11, 1937, were there any other written instruments executed by the company and a labor organization among your employees?

A. Any written instruments?

Q. Yes.

A. No, that is, not written, as far as I can recall.

Mr. Walker: Will you mark this as Board's Exhibit 9, Mr. Reporter?

(The document referred to was marked as Board's Exhibit No. 9 for identification.)

(Testimony of F. A. Polson.)

Trial Examiner Kent: We will take a five-minute recess.

(Whereupon, a short recess was taken.)

Q. (By Mr. Walker): Mr. Polson, I hand you what has been marked as Board's Exhibit No. 9, for identification and ask you what that is.

A. Well, I am not sure that the wording is the same, but it is a general reaffirmation of some points that had been accepted verbally.

Q. Generally, is the instrument a copy of an arrangement entered into between the company and Local 3-2, I. W. A.?

Mr. Maxwell: I will object to the form of the question. [37]

Trial Examiner Kent: What is the answer?

Mr. Walker: It has not been answered.

Trial Examiner Kent: The answer may be taken.

A. Generally, it is a confirmation of a verbal understanding, reduced to writing.

Q. (By Mr. Walker): Between February 11, 1937, and June 21, 1940, were there any written instruments entered into between the company and a labor organization of its employees?

A. I don't recall that right now.

Q. Has the company entered into any other written instruments of any kind with any labor organization of its employees, other than Board's Exhibits 7, 8, and 9, for identification?

Mr. Maxwell: Within what period of time, Mr. Walker?

(Testimony of F. A. Polson.)

Mr. Walker: That runs from August 14, 1935, down to May 21, 1940.

Mr. Maxwell: The 21st?

Mr. Walker: The 21st. I mean, up to that date?

A. Yes, there are other agreements.

Q. Well, then, let us break it up; has the company entered into any written instruments of any kind with any labor organization of its own employees other than Board's Exhibits 7, 8, and 9, between the dates of August 14, 1935, and June 21, 1940?

Mr. Maxwell: I will object to the form of the question [38] as being too general. If counsel has some subject specifically in mind, it would expedite the matter if he would refer to it specifically.

Trial Examiner Kent: The answer may be taken.

A. Yes, there are other agreements.

Q. (By Mr. Walker): Since June 21, 1940, has the company entered into any written agreements of any kind with any labor organization of its own employees? A. Yes.

Mr. Walker: May we go off the record?

Trial Examiner Kent: Off the record.

(There was a discussion off the record.)

Trial Examiner Kent: On the record.

Q. (By Mr. Walker): Was the Carpenters and Joiners, the A. F. of L. organization that represented your employees, an industrial type of organization? A. I would presume so.

(Testimony of F. A. Polson.)

Q. Did it represent all types of the company's employees except, of course, supervisory and office employees? A. The question is not clear.

Mr. Maxwell: You mean, were they members; is that what you are getting at?

Q. (By Mr. Walker): Were all types of the company's employees either represented by or had membership in the A. F. of L. Local, except, of course, the supervisory and office force? [39]

A. That is not clear to me.

Mr. Maxwell: Mr. Examiner, I would like to raise any objection to the form of the question. Perhaps if we could go off the record we could clarify it.

Trial Examiner Kent: Yes, off the record.

(There was a discussion off the record.)

Mr. Walker: Will you read the last question, Mr. Reporter?

(Thereupon, the question was read aloud by the reporter as above recorded.)

Trial Examiner Kent: Well, was there a contract? Wouldn't that cover it?

Mr. Walker: There was a contract.

The Witness: I am still somewhat confused. I think your question is a little bit vague.

Q. (By Mr. Walker): Wherein are you confused, Mr. Polson?

A. I couldn't specify,—I don't know what was required regarding membership, or how many men

(Testimony of F. A. Polson.)

did belong to the different labor organizations; I have not gone through their books or audited them; I think they could present that testimony.

Q. You had dealings with the local representing the Carpenters and Joiners, didn't you?

Mr. Maxwell: That is 1935 to 1937?

Mr. Walker: That would be the period. [40]

A. I presume so; through our own men or through their representatives.

Q. (By Mr. Walker): And what did the representatives of your own men tell you? What did they tell you as to what group of employees they purported to represent?

A. They purported to represent them all.

Q. All types of employees?

A. All types that were entering into negotiations.

Q. I beg your pardon?

A. All types, that is, generally all types of employees, yes; I think that covers it. You will notice some exceptions.

Q. Excepting supervisory and office force?

A. Yes.

Q. Excepting those, all types of employees were purported to be represented by the Carpenters and Joiners Local? A. Yes.

Q. And is Local 2, I. W. A., an industrial type of organization? A. I believe so.

Q. And does it purport to represent all types of your employees, excluding, of course, the supervisory and office employees?

(Testimony of F. A. Polson.)

A. I believe so.

Q. You appeared in the Representation hearing held December [41] 16 and 17, 1940, in XIX-R-538, and XIX-R-539?

A. Those numbers don't mean much to me. I was present at a hearing.

Q. I see. You did appear at the hearing?

A. Yes.

Q. Has the company at all times preferred to deal with an industrial type of labor organization?

Mr. Maxwell: I will object to the form of the question. It has no bearing upon any issue here.

Trial Examiner Kent: Reframe your question.

Q. (By Mr. Walker): At that hearing, did you express, as the company's opinion, the desirability of dealing with an industrial type of labor organization?

Mr. Maxwell: I will object to the form of the question. The issue is not an industrial type of organization, but that of a bargaining unit.

Trial Examiner Kent: Was there a Board order issued in that proceeding?

Mr. Walker: Yes.

Trial Examiner Kent: I will sustain the objection.

Q. (By Mr. Walker): At that hearing, December 16 and 17, 1940, in Hoquiam, did you, as the company representative, express as the company's opinion the desirability of dealing with an industrial type of organization and through an industrial type of unit? [42]

(Testimony of F. A. Polson.)

Mr. Maxwell: I will object to the form of the question. And also, may it be understood that my objection runs as to the merits and relevancy of this line of questions. I want a general objection to this whole line. [43]

Trial Examiner Kent: Reframe your question.

Mr. Walker: I will withdraw the question, in view of the discussion which took place off the record, and in lieu thereof I ask that the Board take judicial notice of the testimony given by Mr. F. A. Polson on December 16, 1940, at Hoquiam, in consolidated cases XIX-R-538 and XIX-R-539, beginning with line 20 on page 88 of the official transcript [44] down to and including line 17 on page 90; also, from line 19 on page 94, down to and including line 18 on page 95; and from line 4 on page 110, down to and including line 19 on page 111.

Mr. Maxwell: That is a left-handed way of putting the testimony in. I will object to counsel's statement.

Trial Examiner Kent: You mean that you are offering this in the record, those pages of testimony?

Mr. Maxwell: I don't understand it to be an offer of the testimony. He is asking the Board to take judicial notice of that testimony.

Trial Examiner Kent: In citing certain pages?

Mr. Maxwell: Yes. If he wants to make an offer of proof by submitting certain pages rather than tearing them out,—

(Testimony of F. A. Polson.)

Trial Examiner Kent: You are asking that it be considered by reference?

Mr. Walker: That is right.

Mr. Maxwell: If he wants to make that as an offer, that is another matter.

Trial Examiner Kent: Well, I will treat it as an offer of proof, and deny the offer at this time. In other words, you may renew your offer and have it considered in connection with other testimony, if you desire, later, if the situation at that time warrants. [45]

Mr. Maxwell: Do you recall the date, Mr. Polson, that Board's Exhibit 4 was presented to you by your employees, or a committee of your employees, which you testified to?

The Witness: It was presented, but it was not dated.

Mr. Maxwell: Do you recall the date it was brought in, or approximately?

The Witness: No, I don't know.

Mr. Maxwell: Do you recall approximately?

The Witness: No; it was in May.

Trial Examiner Kent: Prior to the discharge?

The Witness: The meeting was prior to the discharge?

Trial Examiner Kent: Yes.

The Witness: Yes.

Mr. Walker: That is all the questions I have. I now offer in evidence what has been marked as Board's Exhibits 5, 6, 7, 8, and 9, together with the duplicates thereof.

Mr. Maxwell: We will object to the introduction and receipt in evidence of Board's Exhibits 7, 8, and 9, upon the ground and for the reason that said exhibits are immaterial and irrelevant to any issue involved in this case, the same exhibits being, or purporting to be, a settlement of the 1935 industry-wide strike. The basis of the settlement entered into on the 11th day of February, 1937, allegedly a settlement of some strike in the early part of 1936 and the first part of 1937; and Board's Exhibit 9 being an agreement affirming an oral agreement that had existed between the company and Local 2 of the I. W. A., at the date of its entry. [47] Further, with respect to Board's Exhibit 7, those matters have no bearing upon the issue, and they are too remote. May we go off the record?

Trial Examiner Kent: Well, there is some materiality in them to show the history of labor relations. My recollection of the testimony is that I don't think they are properly identified. I am referring to Exhibit No. 7 and Exhibit No. 8. [48]

BOARD'S EXHIBIT No. 5

S. F. No. 5334—1938—25M—5474-A

State of Washington

Unemployment Compensation Division

Olympia, Washington

SEPARATION REPORT

1. Name of Worker Clayton Reece S. S. A. No. 535-10-9103
2. Date of Separation May 21 1940

3. Wages in lieu of notice from, 19...., to,
19.... \$.....

4. Reason for separation (check one):

- (-) Quit work voluntarily without good cause.
- (x) Discharged for misconduct connected with work.
- (-) Other reason.

Remarks: Reason for discharge: Violation of safety rules and/or unsafe operation.

I (we) certify that the information furnished is true and correct and that the above named worker was separated from employment on the date shown above and for the cause checked, which I (we) believe may disqualify him.

Employer Name — Polson Logging Company, U. C. No. 85 994 04728 00

Address—Hoquiam, Washington

Place of employment if different from address of employer—

Certified correct by

/s/ B. LANGABEER

Title: Supt. Soc. Sec. Dep't.

Date Signed: 6/15/40

Instructions to Employer

Mail original and duplicate immediately to nearest Washington State Employment office. Give triplicate copy to worker. Retain fourth copy for your file.

Always give the worker the printed form, "How to Apply for Benefits", when he leaves your employ, regardless of reason for such separation.

TriPLICATE—Claimant's Copy.

BOARD'S EXHIBIT No. 6

S. F. No. 5334—1938—25M. 5474-A

State of Washington
Unemployment Compensation Division
Olympia, Washington

SEPARATION REPORT

1. Name of Worker Dave Lytle S. S. S. No. 531-03-6102.
2. Date of separation May 21, 1940.
3. Wages in lieu of notice from....., 19....., to.....
19....., \$.....
4. Reason for separation (check one):
 - () Quit work voluntarily without good cause.
 - (x) Discharged for misconduct connected with work.
 - () Other reason.

Remarks: Reason for discharge: Violation of safety rules and/or unsafe operations.

I (we) certify that the information furnished is true and correct and that the above named worker was separated from employment on the date shown above and for the cause checked, which I (we) believe may disqualify him.

Employer Name—Polson Logging Company, U .C. No. 85 994 04728 00

Address—Hoquiam, Washington

Place of employment if different from address of employer—

Certified correct by

/s/ B. LANGABEER

Title: Supt. Soc. Sec. Dept.

Date Signed: 6/15/40

Instructions to Employer

Mail original and duplicate immediately to nearest Washington State Employment office. Give triplicate copy to worker. Retain fourth copy for your file.

Always give the worker the printed form, "How to Apply for Benefits", when he leaves your employ, regardless of reason for such separation.

Triplicate—Claimant's Copy.

BOARD'S EXHIBIT No. 9

(Copy)

MEMORANDUM OF AGREEMENT

The Polson Logging Company hereby reaffirms recognition of Local No. 2, I. W. of A., as the sole collective bargaining agency for all its employees, excepting superintendents, foremen, timekeepers, bull-buckers, civil engineers, check scalers, office employees and the boommen who are members of the I. W. of A. and who are under a separate contract.

Local No. 2, I. W. of A., and the Polson Logging Company mutually agree to maintain present conditions of employment until these are changed, either in proposed joint negotiations or in negotiations between Local No. 2, I. W. of A., and the Polson Logging Company.

Dealing for collective bargaining between the Polson Logging Company and Local No. 2, I. W. of A., shall continue to be through a committee of the employees of the Polson Logging Company, with the assistance of anyone they desire.

Signed at Hoquiam, Washington, June 21, 1940.

For the Union

Local No. 2, I. W. of A., by
H. I. TUCKER,

Pres.

DENEE DYER,

Bus. Agt.

KALIS HECK,

JOE BRANT,

LESTER WALKER,
WM. E. ANDERSON,
GEO. TURNER.

For the Company
POLSON LOGGING CO.,
By F. A. POLSON.

DAVE LYTTLE

was called as a witness on behalf of the Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Walker: [49]

Q. What is your occupation?

A. At the present time?

Q. No. A. Brakeman.

Q. Have you ever been employed by the Polson Logging Company? A. I have.

Q. When did your employment there begin?

A. In the fall of 1934.

Q. At what type of work?

A. What do you mean?

Q. At what type of work did you begin your employment there?

A. I first began as a brakeman.

Q. At any time after that, was there any change in the status of your employment as a brakeman?

A. I started in as a second brakeman. I worked at that for a short time and then was promoted to head brakeman.

(Testimony of Dave Lytle.)

Q. About how long?

A. I don't know exactly, but I think it was about three weeks.

Q. How long did your employment there at the Polson Logging Company continue?

A. My employment continued until the fall of 1937. [50]

Q. And what occurred at that time?

A. I quit.

Q. Did you after that ever return to the Polson Logging Company?

A. Yes, I did; I was off for two weeks, and I was requested to go back.

Q. What do you mean by that?

A. Why, the train master, Bill Gordon, came down and wanted me to go back.

Q. And did you? A. I did.

Q. When you returned, at what work did you return?

A. I returned as head brakeman.

Q. And then how long did you work there? How long did your work continue after that?

A. I worked there until, let's see, I don't know just exactly how long, but the camp was down,—I think, usually, that camp was down.—It was in the fall of 1937 when those camps shut down.

Q. And did the camps resume operations at sometime after the fall of 1937? A. Yes.

Q. When?

(Testimony of Dave Lytle.)

A. If I remember right, it was in the fall of 1938 when I was called back. [51]

Q. Who called you back?

A. Mr. Ellingson.

Q. At what job? A. Brakeman.

Q. Did you go back? A. I did.

Q. How long did you work there then?

A. Until May 21, 1940.

Mr. Maxwell: I will object to that as immaterial. What happened in 1934 has no bearing upon any issue in this case.

Trial Examiner Kent: I think it is remote; I don't think it has any material bearing on the issue.

Mr. Walker: Except, Mr. Examiner, the only purpose I have of offering any testimony of this nature is to show the extent of this man's experience in railroading.

Trial Examiner Kent: Well, the question, I imagine, will be brief; two or three questions will cover it, will they not?

Mr. Walker: Yes. [52]

Trial Examiner Kent: The answer may be taken.

Q. (By Mr. Walker:) When did you first begin railroading?

Mr. Maxwell: It is understood that my objection goes to the entire line.

Trial Examiner Kent: Yes, you may have an objection to the entire line.

A. In 1913.

Q. (By Mr. Walker:) From 1934 to May 21,

(Testimony of Dave Lytle.)

1940, had you ever done any other type of work than railroading?

A. Oh, during the slack times and during the depressions there, off and on; practically none, no.

Q. Whenever there was work available railroading, did you do any other kind of work from 1913 until May 21, 1940? A. No, I did not.

Q. Are you a member of any labor organization?

A. I am.

Q. And what organization?

A. Brotherhood of Railroad Trainmen.

Q. How long have you been a member of that?

A. Since 1917.

Q. In the year 1940, was there an organizational effort made by the Brotherhood of Railroad Trainmen among the employees of the Polson Logging Company? A. There was.

Q. And when did that begin? [53]

A. It began along in February.

Q. What year? A. 1940.

Q. And how did it come about?

A. Well, the engine men and trainmen were both dissatisfied under the present set up, and they figured they could do better in their own organization, and they knew that I had been a trainman for a long time.

Q. Who did?

A. The employees. And they wanted to know if I had any idea the Brotherhood would take them in. I told them I didn't know, but I would find out;

(Testimony of Dave Lytle.)

and that is what I did. I wrote to the secretary of our lodge, No. 403, at Tacoma, Washington.

Q. What was done along the line of organizing the Brotherhood?

A. I wrote to our secretary, and he wrote to our president in Cleveland, Ohio, and he told me that if the trainmen would all join the Brotherhood, that he was satisfied that we could work out an agreement or negotiate for an agreement.

Q. Well, did you do anything toward organizing the employees into the Brotherhood?

A. I did.

Q. What did you do?

A. I got the application blanks.

Q. What kind of application blanks? [54]

A. The membership application blanks.

Q. From whom did you get them?

A. From the secretary of our Tacoma Lodge.

Q. What did you do with them?

A. I circulated them amongst the trainmen,—the brakemen.

Q. About when was that?

A. I started in February, 1940.

Q. Where did you do it?

A. Some I did out there on the job; some at home; some at the camp and the house; and some at the meetings down town.

Q. Was there anything done in connection with further organizing after you had obtained the signatures and application cards? The signatures to the application cards?

A. Yes.

(Testimony of Dave Lytle.)

Q. What did you do next?

A. We had to get the authorization blanks authorizing the Brotherhood to represent the members in negotiations.

Q. And who did that? A. I did.

Q. When did you do that?

A. I did that,—I believe it was in April.

Q. Where did you do it?

A. I did it about the same as the applications,—some at the job, some at the house, and some at the meetings.

Q. Following the securing of the authorization blanks, is [55] there anything else that you did?

A. Yes.

Q. What was the next step?

A. The next step was to draw up our agreement.

Q. Was that done?

A. Yes, that was done.

Q. After the form of agreement was drawn up, was anything next done?

A. Then we formed a letter to Mr. Polson.

Q. Was that done?

A. Yes, that was done.

Q. After preparing a letter and a form of agreement, was anything next done? A. Yes.

Q. What?

A. After it was taken down and handed to Mr. Polson,—it was taken down and handed to Mr. Polson.

Q. Who did that? A. The committee.

(Testimony of Dave Lytle.)

Q. Who was on the committee?

A. Well, the same——

Q. Were they same individuals Mr. Polson mentioned?

Mr. Maxwell: Let him answer.

Mr. Walker: Oh, it doesn't make any difference.

A. Sam Key, Lawrence Brant for the engineers; Clayton Reece, [56] W. J. Williams, and myself for the trainmen.

Q. Where was that meeting?

A. That meeting was down in the Polson Building in Hoquiam.

Q. What did you call it?

A. Down in the Polson Building in Hoquiam.

Q. When was that?

A. That was May 18, 1940.

Q. About what time of day?

A. Well, eleven o'clock in the morning.

Q. Who did the committee meet with?

A. Arnold Polson.

Q. Who else?

A. Bennett Ellingson and A. M. Polson.

Q. How long did the meeting last?

A. About half an hour.

Q. What occurred at that meeting?

A. Well, I handed Mr. Polson the agreement, with a letter and told him that the committee would like to negotiate with him.

Q. How did that meeting come about?

A. It came about that I went down, I think it was Thursday,—I am not exactly positive on that.

(Testimony of Dave Lytle.)

Q. What Thursday?

A. Thursday of the same week in 1940; that would be May 16.

Q. Where did you go on that Thursday? [57]

A. I went to Mr. Polson's office.

Q. Did you see anybody there?

A. I asked to see Mr. Polson.

Q. Did you see him?

A. Yes, Mr. Polson saw me.

Q. Was the meeting of the 18th arranged as a result of that? A. Yes, it was.

Q. Will you go ahead and describe what occurred at the meeting of the 18th?

A. I handed Mr. Polson the agreement, with a letter, and told Mr. Polson we would like to negotiate with him; and Mr. Polson looked at the agreement,—looked the agreement over and read the letter, and he said he could not sign right at the present time; that he wanted a few days to take it to his lawyer and let his lawyer look it over. He said he was not in the habit of signing anything without personally first knowing what it was.

Q. Did anybody say anything to that?

A. And he wanted to know why we were pulling out of the I.W.A., and he said he thought we would be better off by staying in the I.W.A. and not splitting it up, as he was running a logging camp and not running a railroad; that he thought one union would be better than two; that two would probably give us a jurisdictional dispute.

(Testimony of Dave Lytle.)

Q. Now, did you say that Mr. Key and Mr. Brant were there? [58]

A. Yes, Mr. Sam Key and Mr. Brant were there.

Q. Did Mr. Polson say anything further at that meeting?

A. Mr. Polson wanted to know why some of them were pulling out of the I.W.A.

Q. Who?

A. Well, Mr. Brant and Mr. Key had served on committees of the I.W.A.; and they told him that they thought their interests would be better served by an organization of their own.

Q. (By Mr. Walker:) Did Mr. Key and Mr. Brant say anything further?

A. Mr. Key and Mr. Brant told him that they thought they would be better off in the Brotherhood; that they had joined the Brotherhood and that they wanted the Brotherhood to represent them.

Q. Did Mr. Polson say anything to that?

A. Mr. Polson said he thought they were making a mistake.

Q. Was there any other discussion at that meeting between any of the members of the committee representing the employees and any of the members of the committee representing the company?

[59]

A. No; Mr. Polson was the spokesman.

Q. What next took place at the meeting after the discussion between Mr. Key, Mr. Brant, and Mr. Polson?

(Testimony of Dave Lytle.)

A. Well, we had a meeting scheduled for 11:30, and Mr. Polson refused to sign our agreement; so we terminated our meeting there, and I asked Mr. Polson for an answer to our letter.

Q. What did you say to him?

A. I told Mr. Polson, "You be sure to give us a written answer to our letter." And he said, "I will." [60]

Q. After he said that, was there anything more at that meeting?

A. Anything more to the meeting?

Q. Yes. [61]

A. No; our meeting was terminated.

Q. What did the members of the committee then do? A. We went back to our meeting.

Q. Where were you during the course of this meeting? A. We were in Mr. Polson's office.

Q. Where in his office?

A. In the small office, off the main office,—a small room off the main office.

Q. Was there a table in there?

A. Yes, there was a table in there.

Q. Were you fellows seated around the table?

A. We were seated on each side of the office, and I believe Mr. Polson was seated at the table.

Q. (By Mr. Walker): At some point in the meeting did the committee then get up from their chairs? [62]

A. They got up when they started to go out the door.

(Testimony of Dave Lytle.)

Q. Did anything occur? A. When?

Q. Just before the committeemen went out the door?

A. Just as we went out the door, I again reminded Mr. Polson of a written answer to his letter.

Q. What did you say?

A. I said, "Be sure to give a written answer to our letter."

Q. Did Mr. Polson say anything to that?

A. He said, "I will; and don't forget what I have told you." [63]

Q. (By Mr. Walker) Did Mr. Polson accompany his statement of "Remember what I told you" with anything? A. Yes; with a dirty look.

Mr. Maxwell: Well, I object to that.

Trial Examiner Kent: Well, "dirty look,"—What do you mean by "dirty look"? Do you mean that he looked angry, or what do you mean?

The Witness: Well, he looked like he didn't like it. [64]

Q. (By Mr. Walker) Now, when that occurred, that you have just now described, where were the other members of the committee?

A. They were just ahead of me, and out on the sidewalk.

Q. Did you work the following day?

A. The following day was Sunday; that was the 19th. We did not work that day.

Q. Did you work the following Sunday?

A. The following Sunday? No.

(Testimony of Dave Lytle.)

Q. I mean, did you work the day following Sunday?

A. The day following Sunday was Monday; that was May 20.

Q. Did you work that day?

A. Yes, we worked that day.

Q. At the conclusion of that day's work, what did you do?

A. We always went over and took oil at the locomotive camp, and then we went over to the board to see if we were marked up the next day, and then we went home.

Q. At the conclusion of your work on May 20, did you look at the call board? A. Yes.

Q. You did? A. Yes.

Q. What did you find?

A. We were marked down for Tuesday morning at 5:20. [65]

Q. Five-twenty in the morning? A. Yes.

Q. Did you work on Tuesday? A. We did.

Q. What time did you go to work that day? What time did your work begin that day?

A. Well, five o'clock.

Q. Did you go to work on that day?

A. We did.

Q. At the conclusion of Tuesday, May 21, what did you do?

A. At the conclusion of May 21, what did we do?

Q. Yes, what did you do at the end of that day?

A. At the conclusion of May 21?

(Testimony of Dave Lytle.)

Q. Yes.

A. We came in and looked at the board.

Q. Where is the board?

A. It is up on the wall at the office.

Q. Where? A. At the Railroad Camp.

Q. You looked up on the board, and what did you find?

A. We looked up on the board. There was two crosses back of my name, and a cross back of my brakeman's name,—

Q. Who was your brakeman? Your second brakeman? A. Clayton Reece.

Q. Had he worked with you on that day? [66]

A. He had.

Q. Now, did you do anything when you saw that?

A. I didn't pay any attention to it. I asked the train master what run we were going to go on tomorrow.

Q. Did he answer you? A. Yes.

Q. What did he say?

A. He said, "Tomorrow is your day off." And then he said, "You are not going to work any more until you see Bennett Ellingson."

Q. What did you say?

A. I asked him why I should see Bennet Ellingson, and he said we were in the "dog house." I said, "In the dog house for what?" He said, "For not flagging the crossing." I said, "What crossing do you mean?" and he said, "The Axford Prairie."

(Testimony of Dave Lytle.)

Q. Did the train master tell you the "Axford Crossing"?

A. Yes.

Q. Was there any more conversation?

A. We discussed it.

Q. What did he say about the Axford Crossing?

A. He said we were in the dog house for not flagging the Axford Crossing.

Q. What did you say?

A. I told him we crossed that crossing the same as always.

Q. Did he say anything further to that? [67]

A. He said Ellingson was pretty mad.

Q. Did you see the train master the morning of the 21st?

A. I did.

Q. And where did you see him that morning?

A. I saw him at Railroad Camp.

Q. Where at Railroad Camp?

A. He always come down,—He came down to the dispatcher's office, in the main office. The dispatcher is in the main office.

Q. Now, did the dispatcher that night, May 21, state anything about having seen Mr. Ellingson that morning?

A. Yes.

Q. You talked with him about it?

A. Yes.

Q. He stated he had seen Ellingson the morning of May 21?

Mr. Maxwell: Leading.

A. He did.

Q. What did he say?

A. He said that Mr. Ellingson was back there before he got his shoes tied up that morning.

(Testimony of Dave Lytle.)

Q. Before who got his shoes tied up?

A. The dispatcher.

Trial Examiner Kent: What is the dispatcher's name?

A. George Grosclose.

Q. (By Mr. Walker): Now, where was Mr. Reece at that time? [68]

Mr. Maxwell: What time?

Q. (By Mr. Walker:) Did Mr. Reece come in with you that evening? A. He did.

Q. And what did Mr. Reece do when you came in there that evening? Do you know?

A. Mr. Reece came in and looked at the board.

Q. Now, did you see Mr. Ellingson at any time after May 21, or did you have a conversation with him?

A. I was told by the train master or dispatcher, —he was acting in the capacity of both,—that I would have to see Mr. Ellingson before I worked again. So, Wednesday, May 22, I called at the camp trying to get in touch with Mr. Ellingson.

Q. What camp? A. Railroad Camp.

Q. Go ahead.

A. I was told that Mr. Ellingson was up at one of the other camps; they didn't know just when he would be back. I said I would call later. So, later, I called Mr. Ellingson's house, and Mr. Ellingson said, "I can't see you today," or "I won't see you today." Then he said, "I will see you Saturday."

Q. Did you? A. I did. [69]

(Testimony of Dave Lytle.)

Q. What happened?

A. That was on Saturday, about ten o'clock in the morning.

Q. Where? A. In Mr. Polson's office.

Q. Where? A. In Hoquiam.

Q. Did you have a talk with him that morning?

A. Yes.

Q. What happened?

A. I asked him why I had been laid off, and he said, "For not flagging Axford Prairie Crossing."

Q. Did you answer him? A. Yes.

Q. What did you say?

A. I said, "It has never been flagged."

Q. What did he say?

A. He didn't say very much; but I said, "You can't flag that crossing without stopping the train and going ahead to flag it."

Q. What did he say to that?

A. He said, "I don't want you to stop."

Q. Did you say anything?

A. I said it could not be flagged otherwise.

Q. Did Mr. Ellingson say anything to that?

A. Mr. Ellingson said, "You don't have to stop. I want you [70] to flag it from the point of the car."

Q. And was there any more conversation at that time? A. Yes.

Q. What was it?

A. I told Mr. Ellingson that it didn't do any good to stand at the point of the car, that if he flagged from the back of the car, or back by the

(Testimony of Dave Lytle.)

dog house, as well as he could,—that he could flag from the dog house as well as he could from the point of the car, and that the brakeman and engineer and fireman could see from the locomotive just as well as they could back there, or the brakeman could from the point of the car.

Q. Did Mr. Ellingson say anything further to that?

A. He said, "You are in the dog house."

Q. Did you say anything to that?

A. No, not at that moment.

Q. That was all?

A. No. I asked him why he was laying Reece off.

Q. What did he say to that?

A. He said, "The same as you are laid off for." I said, "Am I fired?"

Q. What did he say?

A. He said, "I will let you know later."

Q. What did you say?

A. I said, "When?" and he said, "Monday." He said, "I have [71] got to see Arnold,—Mr. Arnold Polson,—first."

Q. Now, which Saturday was this that you had this conversation with Ellingson?

A. The one immediately after.

Q. The one immediately after the 21st?

A. The one immediately after the 21st.

Q. Have you related all the conversation that took place that Saturday afternoon at Mr. Polson's office between yourself and Mr. Ellingson?

(Testimony of Dave Lytle.)

A. Mr. Ellingson said he had to see Mr. Polson before he could give me an answer, and that he was taking his orders from Mr. Polson; that Mr. Polson had sent him out to watch that crossing.

Q. Did you say anything to that?

A. I told him, "O. K."

Q. Was there anything more to that conversation?

A. I said, "You will let me know Monday?" and he said, "Yes."

Q. Was there anything else?

A. That is all there was to it.

Q. Did you see him Monday? A. I did not.

Q. Did you see him at any time again before Saturday, May 25?

A. I saw him a few times on the street.

Q. I mean, again at any time after May 25, in connection with your conversation at that time? [72]

A. No; I have never seen him since.

Q. When did you get your termination slip?

A. Termination slip?

Q. The slip showing that you had terminated your services with the company? When did you get that?

A. I got that along in June.

Q. At approximately the date it bears there?

A. I believe it was after that date. I had to go and call for it. I didn't know there was any such a thing as that until I went to the Unemployment office.

(Testimony of Dave Lytle.)

Q. Was the letter and form of agreement to which you referred in your testimony, which is marked as Board's Exhibit 4 for identification,—

A. Those are the ones which were handed to Mr. Polson by the committee.

Q. Now, before this meeting at Mr. Polson's office on May 18, had you had a talk at any time with Mr. Ellingson about a labor organization or labor organizations? A. Not that I recall.

Q. Have you ever worked on the gravel train?

A. I have.

Q. Hauling gravel? A. Yes.

Q. About when did you do that?

A. Different times. [73]

Q. Last preceding May 18, when was the last time preceding May 18?

A. It was along in April, I believe; I am not sure of that, because there was different stretches of that.

Q. At any time while you were engaged on the gravel train, did you have a conversation with Mr. Ellingson?

A. Well, you couldn't call it a conversation; it was just Mr. Ellingson asked me,—he said that he had heard we were going into the Brotherhood.

Q. (By Mr. Walker:) Mr. Ellingson asked you what?

A. If we were going into the Brotherhood. I was standing on the gangway of the locomotive at that time; we were both stand- [74] ing there; the

(Testimony of Dave Lytle.)

locomotive was running. And I told him that we were,—that most of us belonged, and that I had belonged for a long time. That is all the conversation there was.

Q. Now, at any time before May 25, did you ever receive any instruction concerning the manner in which you were to carry out your job as conductor? A. From Ellingson?

Q. From Mr. Ellingson or Mr. F. A. Polson or Mr. A. M. Polson? A. I never had.

Q. (By Mr. Walker:) At any time prior to May 25, 1940, were there any printed or posted rules concerning the manner of operating the Polson trains in operation?

A. There was only one posted rule.

Q. And what was that?

A. Regarding low trucks in motion.

Q. And what was that rule?

A. It said, "Don't set or release brakes on low trucks while train is in motion."

Q. Prior to May 25, 1940, had you ever been told to flag the train from the front end of the car while crossing crossings? [75]

A. I never had.

Q. Had Mr. Ellingson ever ridden on your train with you? A. He had.

Q. Where?

A. He usually rode, sometimes on the flat car and sometimes in the dog house.

Trial Examiner Kent: I think this a good time

(Testimony of Dave Lytle.)

to explain what is meant by "dog house." I think that word has been used in another sense prior to this, and I think perhaps it has a different sense in this connection. This would be a good time to have that made clear on the record.

Q. (By Mr. Walker:) What is the dog house?

A. That is a little shanty that is built on a flat car; that is about eight feet long. It is about eight feet long and six feet wide.

Q. (By Mr. Walker:) When Mr. Groscluse referred to you being in the dog house, what was he referring to?

A. He was just referring to the fact that I was in bad with Mr. Ellingson.

Q. Where were you at these times when Mr. Ellingson was riding in the shanty; let us call it that, so we won't get it mixed up with the same words which have another meaning. [76]

A. I was in the shanty, where he was a part of the time, and a part of time he was out on the flat car. A part of the time I was out on the flat car.

Q. Were there any instances previous to May 21, 1940, in which you and Mr. Ellingson had both been in the shanty while the train crossed a crossing?

A. Not that I recall.

Q. Have you ever been informed of any verbal rules, or had you ever been informed verbally of any unwritten rules covering the operation of the Polson railroad,—at any time prior to May 21, 1940?

A. No.

(Testimony of Dave Lytle.)

Q. Now, who were the four individuals that met with the company on May 18? There were four, were there not? A. Yes.

Q. Who were they?

A. Mr. Key, myself, Mr. Reece, and Mr. Brant.

Q. What were you?

A. What do you mean?

Q. What position did you hold?

A. Mr. Reece and I were members of the Trainmen's Grievance Committee; Mr. Reece was secretary and I was chairman, and Mr. Williams was associate member.

Q. And when was that committee formed?

A. That committee was formed in March, I think it was. [77]

Q. In March? A. I think so.

Mr. Walker: I am through questioning the witness, and this might be a good place to read the description in.

Trial Examiner Kent: Yes, if you have it in form.

Mr. Walker: It is hereby stipulated by the parties that the following may be received in evidence and have the same force and effect as though testified to by competent witnesses:

Whenever, throughout the record the word "Crummy" appears, it shall be understood to refer to a flat car which, on the Polson operation, serves as a caboose; whenever, throughout the record there appears the use of the term, "dog house" in con-

(Testimony of Dave Lytle.)

nection with the "crummy," it shall be understood to refer to an enclosed structure situated on the platform of the flat car.

The crummy platform stands 47 inches in height, measured from the rail top; the length of the side of the crummy is 33 feet, excluding couplings; the width of the platform is $8\frac{1}{2}$ feet.

The structure situated on the flat car measures 6 feet 8 inches in height from the crummy platform to the roof. Between the sides of the dog house and the sides of the crummy platform, there is a clearance of 17 inches. In the front of the dog house, a window is situated 57 inches in height from [78] the crummy platform; the window is set over 6 inches from the right side of the front of the dog house, and it is recessed 4 inches from the base of the front of the dog house. The window pane measures 13 inches in height by $11\frac{1}{4}$ inches wide.

On each side of the dog house, centered from the front to back, located 57 inches in height from the crummy platform are windows, consisting of three panes, each pane $9\frac{1}{2}$ inches square, each pane being separated by a mutton (a mutton is a narrow strip of wood separating the panes).

On each end of the dog house are sliding wood doors, which are solid; the side windows slide from front to rear. The crummy car carries a train air line, but its own brakes are hand-operated.

The length of engine No. 18 is 34 feet from the cab platform to the front draw bar; the cab plat-

(Testimony of Dave Lytle.)

form is 76 inches in height, measured from the top of the rail. The tender of engine No. 18 on May 21 was 23 feet in length, excluding the rear coupling. The tender tank rests on a flat car platform. The platform thereof is 49 inches in height, measured from the rail top.

The tender tank measures approximately from 4 to 6 feet in height from the flat car platform upon which it rests.

Trial Examiner Kent: Is that stipulated?

Mr. Maxwell: I so stipulate.

Trial Examiner Kent: What does a logging train consist of? [79] You have the engine and tender?

The Witness: And the dog house.

Trial Examiner Kent: The dog house is on the flat car?

The Witness: Yes.

Trial Examiner Kent: Just one flat car?

The Witness: That takes the place of the ca-boose.

Trial Examiner Kent: You may have several flat cars in between your locomotive and the dog house?

The Witness: You carry the dog house behind your locomotive, and then you have your train.

Trial Examiner Kent: The dog house is on the first car?

The Witness: The dog house is right next to the locomotive, yes; and the dog house part is built on the flat car, on the end next to the locomotive.

(Testimony of Dave Lytle.)

Trial Examiner Kent: Well, the conductor and the brakeman, do they both ride in the dog house, or are they in another part of the train?

The Witness: They can be on any part of the train. If they have to be on the tail end, if they have got a train of logs, or if they have to be out for setting the brakes, or something like that,—when they are pulling empty, they ride in the dog house next to the locomotive; that is carried there all the time.

Trial Examiner Kent: I think I see.

The Witness: That dog house is carried back of the loco- [80] motive practically all the time, and so when you are backing up and pulling the drag, that dog house is still behind the locomotive; or whether you are shoving them. See?

Q. (By Mr. Walker:) In what direction was train No. 18 travelling after leaving the railroad camp on May 21?

A. It was travelling towards Camp 2.

Q. On May 21, when you left the railroad yards, what locomotive was being operated?

A. Locomotive No. 18.

Q. What tender was being operated that day?

A. The tender that belonged to No. 101.

Q. Will you draw a sketch indicating the position the crummy was with respect to the tender and Engine No. 18, in the direction in which the train was moving that morning? [81]

A. Well, I have drawn something here, if you can understand it (indicating document).

(Testimony of Dave Lytle.)

Q. Is that sketch drawn to scale?

A. No. It is drawn, and the measurements are given on it, as near as I could recollect. I am not much of an artist.

Mr. Walker: Will you mark that as Board's Exhibit No. 10, Mr. Reporter?

(Whereupon, the sketch above referred to was marked as Board's Exhibit No. 10 for identification.)

Q. (By Mr. Walker:) Now, referring to Board's Exhibit No. 10, which is the first figure which appears to the left of the exhibit as you are looking toward it?

Mr. Maxwell: From the bottom?

Mr. Walker: Yes.

Mr. Maxwell: Why not label it?

Q. (By Mr. Walker:) Is the first one on the left, the crummy?

A. The first figure?

Q. Yes.

A. The first figure is on the crummy.

Trial Examiner Kent: Why don't you mark it "crummy," "tender," and "locomotive"?

The Witness: All right (marking on Board's Exhibit 10).

Mr. Walker: I offer in evidence what has been marked as Board's Exhibit No. 10 for identification. [82]

Cross Examination

Q. (By Mr. Maxwell:) Mr. Lytle, you testified

(Testimony of Dave Lytle.)

as to your activities in the organization or formation of the Brotherhood? A. Yes, sir.

Q. (By Mr. Maxwell:) Well, in this organizational activity, did you do that openly? [83]

A. Certainly we did it openly.

Q. (By Mr. Maxwell:) It was in 1934 when you say you started at the Polson Logging Company? A. I did.

Q. You are a member of the A. F. of L., were you not? A. The A. F. of L.?

Q. The A. F. of L. Union that represented the Polson Lumber employees? A. I was.

Q. You were active in that union, were you not?

A. I was not.

Q. You were a member of the I. W. A. that represented the Polson employees from 1937 on, were you not? A. Yes.

Q. And the shift from the A. F. of L. to the I. W. A. occurred sometime during the year 1937?

A. It did.

Q. Does the month of August refresh your recollection as to the approximate date of the shift?

A. Well, let's see; I couldn't tell you the shift, because when we sent our dues book in for the A. F. of L. to pay the dues, they came back with C. I. O. dues book. I couldn't tell you the date.

Q. That was the action of a majority of the employees, the [84] shift from the A. F. of L. to the C. I. O. in the logging industry?

A. Yes.

(Testimony of Dave Lytle.)

Q. And the shift was taken throughout,—that shift occurred throughout the logging industry?

A. Well, it was here.

Q. When you say “here,” you mean in the Grays Harbor area? A. Yes.

Q. Other logging camps as well?

A. I imagine it was. I couldn't tell you about the other logging camps; I was not in them.

Q. (By Mr. Maxwell): Had any of the officers of the company—Did any of the officers of the company, or any of your supervisors object to you organizing for the Brotherhood? Did any of your superiors object?

Mr. Walker: I will object to that on the same ground. It is one of the issues to be determined here. [85]

Mr. Maxwell: I am talking about the organization work, Mr. Walker.

Trial Examiner Kent: The answer may be taken.

Mr. Walker: It all goes to what is an objection. A statement made by Mr. Polson at the meeting of the 18th, for instance?

Mr. Maxwell: Well, I am going into that. I don't know what it is.

Trial Examiner Kent: It is cross-examination, of course. You may answer.

A. I never asked the company's consent or asked their opinion on it.

Q. And they never,—

(Testimony of Dave Lytle.)

A. (Interposing) And they never volunteered any.

Q. As a matter of fact, isn't it true that the company remained aloof from organizational activities or the selection of the unions by their employees?

Mr. Walker: Same objection.

Trial Examiner Kent: The answer may be taken.

Q. (By Mr. Maxwell): That means that they stayed out, and they didn't say anything about which union to join, or anything about your union activities when you joined the A. F. of L., nor did they tell you which union to join when the employees joined the C. I. O.?

Mr. Walker: If it is limited to that, I have no objection. [86]

A. No, they did not.

Q. (By Mr. Maxwell): There never was any attempt on the part of the company to dictate to the employees what union, if any, they should belong to, isn't that correct?

Mr. Walker: Mr. Examiner, the only reason I have in objecting to the question is to the vague terminology. What may be an objection by the company, and what may be dictation by the company, depends upon a construction of those terms. When the manager of the company speaks to those men at a meeting and says certain things, is that dictation or is it an objection to the forming of the Brotherhood, or what is it?

(Testimony of Dave Lytle.)

Trial Examiner Kent: Of course, that is a question of law, I suppose. I think your objection could probably be covered by redirect examination, and then from the entire record it is up to somebody to draw the conclusion. But I think the question on cross-examination is proper.

Mr. Maxwell: The question has been answered, has it not?

Mr. Walker: No, it has not.

Trial Examiner Kent: Will you read the question?

(Thereupon, the last question was read aloud by the reporter as above recorded.)

Mr. Stevens: Mr. Examiner, shouldn't the question be clarified sufficiently to indicate whether counsel has in mind these proceedings through the A. F. of L. or C. I. O., [87] or does he mean it to include this particular issue? In other words, is the question to be limited to the transfer from the A. F. of L. to the C. I. O.?

Trial Examiner Kent: Now, of course, on cross-examination, counsel has considerable latitude. If the witness does not understand the question, he is at liberty to say so.

Q. (By Mr. Maxwell): Do you understand the question?

A. I don't believe I understand the question yet.

Q. You mean now?

Trial Examiner Kent: Will you read the question, Mr. Reporter?

(Testimony of Dave Lytle.)

(Thereupon, the question referred to was again read by the reporter as follows:)

“Question: There never was any attempt on the part of the company to dictate to the employees what union, if any, they should belong to; isn't that correct?”

Q. (By Mr. Maxwell): Is that clear to you, Mr. Lytle?

A. Does that mean the A. F. of L. from the C. I. O.?

Q. Well, I will ask you this: When were the employees first organized? Do you know?

A. 1935.

Q. Well, were they represented by any labor organization prior to that time?

A. No, they were not; not that I know of.

Q. When they organized in 1935, they did not do so at the [88] dictates of the company did they?

A. I hardly think so.

Q. The company didn't tell them to join the A. F. of L., did they?

A. I don't think so.

Q. When they transferred their affiliation from the A. F. of L. to the C. I. O., the company did not tell them to, did they?

A. I don't think so.

Q. And when you talked with Mr. Ellingson in April, while you were working on the gravel train, he asked you if you were going to join the Brotherhood? Did I understand you correct?

A. Yes.

Q. And you said, “Yes”?

A. Yes.

(Testimony of Dave Lytle.)

Q. He didn't tell you not to?

A. He didn't say anything to that. [89]

Q. That is right. Now, at the time you submitted Board's Exhibit No. 4 to the company with the request that they sign the agreement attached thereto, how many men belonged to the Trainmen and Engineers?

A. I believe there were about thirty-three.

Q. You mean, including both branches?

A. Yes, I think that is right.

Q. Both branches?

A. I believe there were about thirty-three at that time, if I remember right.

Q. And there were about thirteen or fourteen,—Strike that. There were about thirty-four or thirty-five men working on the railroad; is that right?

A. Yes, I think there was.

Q. That, however, was made known to the company, was it not?

A. That they belonged to the Brotherhood?

Q. Yes.

A. I believe that the company was informed that a majority of them belonged.

Q. Do you recall, in support of your claim, you furnished a signed statement by each of the individuals that they had selected the Brotherhood, or Brotherhoods, as their representative?

A. What was that question? [90]

Q. Do you recall securing from each of the men

(Testimony of Dave Lytle.)

working on the railroad eligible to membership in the Brotherhood a signed statement to the effect that they had designated the Brotherhood as their bargaining agent? A. Yes.

Q. And those slips were submitted?

A. Yes, those slips were submitted after this agreement was submitted to the company; after the agreement——

Q. After the agreement was submitted?

A. Sometime after the agreement was submitted.

Trial Examiner Kent: That agreement was submitted when?

The Witness: May 18, 1940.

Q. (By Mr. Maxwell): Now, referring to the matter of run-away cars along in April, do you recall that matter in April, 1940? A. Yes.

Q. You were the head brakeman at that time?

A. I was.

Q. Didn't Mr. Ellingson investigate the cause of this accident, the cause of them getting out of control?

A. Mr. Ellingson was not superintendent at that time.

Q. Was Mr. Ellingson superintendent in May, 1940?

A. You are talking about 1940?

Q. Wasn't the run-away train, or the run-away cars,——

A. (Interposing) When? In 1940? [91]

(Testimony of Dave Lytle.)

Q. Well, are you thinking of that accident and wreck you had in 1937?

A. That is the one I am thinking about, yes.

Q. Well, in 1940, a train got out of control, did it not? You were the head brakeman when it got out of control?

A. Yes, I know what you are referring to now.

Q. Mr. Ellingson talked to you at that time?

A. About the run-away?

Q. Yes.

A. Mr. Ellingson wanted to know why we came down the hill so fast.

Q. Isn't it true that you might not have had enough brakes set, or that some of them might have kicked loose?

A. And I told him.

Q. You told him that?

A. I certainly did.

Q. And at that time didn't Mr. Ellingson say to you, "You want to watch yourself on flagging crossings"?

A. He did not.

Q. He did not warn you at that time about flagging the crossings?

A. He certainly did not.

Q. At that time, did he tell you you were on probation?

A. He did not.

Q. Isn't it true that it has been the practice and the policy [92] of the Polson Logging Company that their rules and regulations be passed along orally as to the safety and safe operation of their trains?

(Testimony of Dave Lytle.)

A. I never heard of any rules or regulations.

Q. How about their orders in the operation of a train; are they written?

A. Their movement orders?

Q. Yes.

A. Their dispatching orders are oral.

Q. They are oral? A. Yes.

Q. All oral? A. Yes.

Q. And the regulations,—Are there any regulations with regard to a flagman going back when the train is stopped on the main line, and there is another train following?

A. The company does not say so.

Q. Well, what is the practice?

A. We flag, if there is anything to flag.

Q. Is that by reason of any regulation of the company? A. No, certainly not.

Q. And that is a safety measure, is it not?

A. Yes.

Q. Now, are you familiar with the safety standards issued by [93] the Department of Labor of the State of Washington?

Q. (By Mr. Maxwell): I hand you Respondent's Exhibit No. 1 for identification and ask you if you know what that is (counsel handed a booklet to the witness)?

A. It is "Loggers' Safety Standards," it says.

Q. You have seen that before, have you not? I mean, not the copy, but those standards?

Mr. Walker: Same objection. It is not limited

(Testimony of Dave Lytle.)

as to time. I will ask that counsel limit the question to relate to prior to May 21, 1940.

Trial Examiner Kent: Well, it is cross-examination. The answer may be taken.

A. I never had anything to do with any of those. [94]

Q. (By Mr. Maxwell): Did you ever see a copy of the regulations' standards?

A. I picked up a copy of this one time.

Q. When did you pick up a copy?

A. I don't remember when it was, either.

Q. Well, was it before May 21, 1940?

A. It was after May 21, 1940.

Q. Where did you pick it up?

A. That I can't say.

Q. As a matter of fact, aren't these distributed to the employees at the Polson Logging Camp?

A. No, they have not been; not that I know of.

Q. Now, is there a rule in the operation of the railroad that all main lines had to be kept clear except by specific permission or orders?

A. Will you frame that question again, please?

Q. Do you recall a rule that the main lines had to be kept clear at all times, except where there was specific permission or orders issued authorizing that the main line be blocked and the train remain thereon?

Mr. Walker: I will object to that; it assumes that there is such a rule.

Mr. Maxwell: I am asking him whether there is.

(Testimony of Dave Lytle.)

Mr. Walker: There is no showing that there was such a rule promulgated by the Polson Logging Company, or any such [95] rule formally issued to any of the employees. [96]

Q. (Mr. Maxwell): As a matter of fact, Mr. Lytle, were you not instructed when the main line was blocked and would be blocked for a period of time, to call the dispatcher?

A. I was not.

Q. You were not instructed to do it?

A. Never instructed to do it.

Q. Did the train, in approaching crossings,—did the engine sound the whistle? A. They did.

Q. Is that not under instructions? [98]

A. Yes; they blowed at the crossings.

Q. (By Mr. Maxwell): And if they didn't blow the whistle at the crossings, you would have called their attention to it, as head brakeman; if they habitually neglected to do so?

A. I have nothing to do with this; I have nothing to do with the whistle.

Q. I know, but if the engineer had habitually failed to blow his whistle at highway crossings, wouldn't you have called his attention to it?

A. No, I would not.

Q. Weren't these instructions, — Weren't there instructions that a whistle be blown at the crossings?

A. The engineer would probably get those instructions. [99]

(Testimony of Dave Lytle.)

Q. (By Mr. Maxwell): Do you know the reason for requiring the whistle to be blown at crossings?

A. It is usually blown as a warning whistle,—signal.

Q. Is that a safety measure?

A. Yes, I suppose you would call it that.

Q. (By Mr. Maxwell): Was there any written instruction requiring that whistles be blown at crossings?

A. Not by the Polson Logging Company.

Q. How are orders for the operation of the train transmitted on the Polson line?

A. They are transmitted by word of mouth, and in case of a telephone failure,— [100]

Q. (By Mr. Maxwell): Was there a regulation, when the trains were out and there was a failure of the telephone line?

A. They had no regulations in effect.

Q. What was done in that case?

A. A man had to use his own judgment.

Q. What do you mean by that?

A. Either stay right where he was,—usually.

Q. In other words, if the telephone failed, the train would stay right there and never move on?

A. So far as orders were concerned.

Q. You say he had to use his own judgment?

A. Yes.

Q. And you mean you would stay right on the spot until the telephone was put back in order?

(Testimony of Dave Lytle.)

A. If that was your judgment, yes.

Q. Might you move along on the road, on your way?

A. That would be up to a man's judgment, just as I said, whether he should go ahead or stay there; if he had no rules or regulations to work under, he would be working in the dark.

Q. Were there any instructions from the train master as to what should happen, or what should be done?

A. No.

Q. There was not? [101]

A. No; there never was.

Q. When you went to work for the Polson Logging Company, what instructions, if any, were you given?

A. We were not given any.

Q. You were just put on the train and turned loose?

A. I certainly was.

Q. In what capacity did you go to work there first?

A. I went to work as a second brakeman.

Q. Did the head brakeman tell you anything?

A. The head brakeman told me what he was going to do; he told me what to do, yes.

Q. Did he ever tell you anything about flagging?

A. The head brakeman didn't have to tell me anything about flagging.

Q. In other words, you knew it all? Did the train master or the dispatcher, as you have referred to Mr. Groschlose, ever give you any general instructions in the way of regulations, or advise you on that?

(Testimony of Dave Lytle.)

A. Just what do you mean by that? Do you mean movement by the train or what?

Q. No. On such matters as safety?

A. No; he never did.

Q. Do I understand then that Polson Logging Company operated approximately fifty miles of railroad without any safety regulations? [102]

A. The Polson railroad never had any posted rules or written rules.

Q. Did they have any oral rules about safety?

A. No.

Q. Nobody ever told you about safety?

A. I never got any instructions at all.

Q. Did you get any advice?

A. On a train movement?

Q. Yes. A. I got train movements.

Q. And that is all? A. That is all.

Q. Now, referring to this meeting of May 18, when you presented this agreement and asked the company's signature, didn't Mr. Polson say that he didn't know whether the company could sign any agreement or deal with you because they had an agreement with I. W. A. Local No. 2?

A. Mr. Polson never mentioned that agreement with Local 2 of the I. W. A.

Q. Did you know whether or not the company had recognized I. W. A. Local No. 2?

A. We didn't figure the company had a written agreement with Local 2, I. W. A.

Q. Did you know that they had been dealing with them for all the employees? [103]

(Testimony of Dave Lytle.)

A. Verbally, yes.

Q. Didn't Mr. Polson tell you that they had recognized I. W. A. Local 2 as the bargaining agent for the employees? A. Yes, he did.

Q. And didn't he say that he didn't know, under the National Labor Relations Act, whether the company could recognize and deal with the trainmen as the bargaining agent for the trainmen, and the engineers for the engineers?

A. Mr. Polson said he would look it over, and talk to his lawyer; he said he would take it to his lawyer for advice.

Q. Yes, and didn't he also at that time refer to the National Labor Relations Act?

A. He said the law would tell him what to do.

Q. That is right. Didn't Mr. Polson agree to submit this to his attorney for advice?

A. Certainly; he said he would.

Q. And when you asked for a written reply, there was no hesitancy on his part in stating that he would give it; isn't that right?

Mr. Walker: I will object to that question on the ground that it calls for a conclusion of the witness. Let's find out what was said by the parties and get the facts of the matter. The conclusions can be drawn by the Board as to the facts, or as to the inferences to be drawn from any conversations. [104]

Trial Examiner Kent: Reframe the question.

Q. (By Mr. Maxwell): What did Mr. Polson

(Testimony of Dave Lytle.)

reply when you asked him for his answer in writing? What did he say?

A. He said, "I will give you an answer."

Q. Handing you Board's Exhibit 3, and calling your attention to page 2 thereof, do those paragraphs not state substantially the same thing that Mr. Polson stated to you when the committee called on him on May 18?

A. Give me that question again, please.

Q. Referring to page 2 of Board's Exhibit 3, the last three paragraphs in the letter of May 29, to you and Sam Key, chairmen of the respective organizations—Brotherhood organizations from the Polson company. Do those paragraphs not state substantially the same thing as Mr. Polson stated to your committee at the meeting in his office on May 18?

A. Mr. Polson does not state in there that we are making a mistake.

Q. Did Mr. Polson state to you on May 18 that the company had an agreement with the I. W. A., Local 2?

A. He said they had been dealing with Local 2, I. W. A.; yes.

Q. And that they had recognized I. W. A. Local 2 as the bargaining agent for all the employees?

A. Yes, he did.

Q. Did he not state to you at that time that he did not know, where a majority of the employees had designated a particular [105] union, whether

(Testimony of Dave Lytle.)

the company had the right to deal with any other union unless the National Labor Relations Board first approved a different bargaining unit or unless the union that had been selected agreed to relinquish the claims over the small groups of employees?

A. Mr. Polson stated that the law would decide that.

Q. Mr. Polson at that time indicated his willingness to be bound by a decision of the Board, did he not, and the law? A. Yes, he did.

Q. Now, at that time did Mr. Polson ask you if you had contacted the C. I. O.?

A. You mean the meeting of May 18?

Q. Yes.

A. Frame that question again, please, Mr. Maxwell.

Mr. Maxwell: Will you read the question?

Trial Examiner Kent: Read the question.

(Thereupon, the pending question was read aloud by the reporter as above recorded.)

A. I don't believe he did.

Q. (By Mr. Maxwell): Did he suggest that you contact the C. I. O. and ask them if they would relinquish the claim for representation of the engineers and firemen and trainmen? A. No.

Q. Was there any heated argument at that meeting of May 18? A. There was not. [106]

Q. You have testified that Mr. Polson stated that

(Testimony of Dave Lytle.)

the men were making a mistake in affiliating with the Brotherhood?

A. He did make that statement. [107]

Q. (By Mr. Maxwell): Did Mr. Polson raise his voice when he made that statement?

A. Not out of the ordinary. [108]

Q. (By Mr. Maxwell): You referred to a crossing as Axford Prairie Crossing? A. Yes.

Q. What is that?

A. That is where the railroad and the highway cross.

Q. What highway?

A. The Olympic Highway.

Q. Is that the main highway of the State of Washington? A. Yes.

Q. And with what railroad?

A. The Polson Logging Company.

Q. Is that crossing known by any other designation? A. This highway crossing?

Q. Yes. A. No; that is what it is.

Q. To refresh your recollection, is that referred to as Crossing No. 1? [109]

A. I suppose it could be called Crossing No. 1.

Q. Do you know whether it is or is not?

A. I have always heard it referred to as Axford Prairie Crossing.

Mr. Maxwell: I will reserve further cross-examination until morning.

EARL WOOD

was called as a witness for and on behalf of the Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Walker:

Q. Will you state your name?

A. Earl Wood.

Q. Where do you live, Mr. Wood?

A. 111 24th Street, Hoquiam.

Q. Hoquiam, Washington? [110]

A. Yes, sir.

Q. What is your occupation?

A. Locomotive engineer.

Q. Are you employed by the Polson Logging Company? A. I am.

Q. How long have you been employed by them?

A. I went to work for them in January, 1922.

Q. 1922? A. Yes.

Q. Since that time have you been employed as an engineer? A. Yes.

Q. Do you know Bennett Ellingson?

A. I do.

Q. And as an engineer, do you have occasion to haul from,—strike that. As an engineer in May, 1940, did you have occasion to haul from Old Camp 6? A. Yes.

Q. Now, did you have a conversation with Mr. Ellingson on or about May 1, 1940?

A. Yes, I did; I no doubt had several.

Q. Where did the conversation take place?

(Testimony of Earl Wood.)

A. If it is the conversation,—Will you give me more information?

Q. On or about May 1, 1940, did you have a conversation with Mr. Ellingson about the Brotherhood? [111]

A. Yes, I remember that very distinctly.

Q. Where did that take place?

A. That took place at what they call the dump siding by Old Camp 6.

Q. And what was said at that conversation?

Mr. Maxwell: Is that the one referred to in the complaint?

Mr. Walker: Yes.

Mr. Maxwell: Was this April first or May first?

Q. (By Mr. Walker): When was it?

A. Well, it was along about that time; I don't remember the date myself.

Q. What was said at that conversation?

A. Well, we had pulled in there on the siding and were waiting for another train, and I was alongside the engine, and Mr. Ellingson came up to me, and he said, "How is she working?" I said, "Pretty good." Then I said, "It is working pretty good." Then he said, "There is a lot of work that needs to be done on the engine."

Q. Did you or Mr. Ellingson say that?

A. Well, maybe I said that. We were talking about it. Anyhow, Mr. Ellingson said, "We were figuring on putting this engine in the shop and getting it overhauled; and there is a lot of repair

(Testimony of Earl Wood.)

work to be done on other engines." But he said, "This Brotherhood trouble has come up, and I don't know how much trouble we are going to have, and it has knocked it all [112] in the head. If there is going to be a lot of trouble, it is going to be shut down." I said I didn't see why there should be any trouble. I told him, "It is a cinch the men don't want any." Then he said, "This man Groves has brought this trouble up. He is a trouble maker, anyway." I told him that I didn't think Mr. Groves had brought up anything any more than anyone else; that if he had, I didn't know anything about it. I told him that there wasn't anything that anybody had brought up; that we were all dissatisfied with the setup in the CIO, and we talked it over and made up our minds to go into the Brotherhood. At that time he didn't like it, he wasn't very well satisfied,—

Mr. Maxwell: Just a moment.

Trial Examiner Kent: Just testify as to what he said.

The Witness: That is all he said, and he turned and left me.

Q. Have you ever had any instructions from anybody concerning [113] safety operations?

A. Well, none outside of blowing the whistle.

Q. Have you ever seen any printed rules or regulations posted about the properties of the Polson Logging Company at any time before May, 1940?

A. No, sir; I never did.

(Testimony of Earl Wood.)

Cross-Examination

[114]

By Mr. Maxwell:

Q. Referring to this conversation you had with Mr. Ellingson, who else was present?

A. There wasn't anyone else present that I know of.

Q. You have worked in the logging industry for sometime, have you not? A. Yes.

Q. Are you familiar with the jurisdictional disputes between unions that have existed in this industry in the past?

A. Well, to a certain extent.

Q. Did Mr. Polson, at the time you had any discussion with him,—Did Mr. Ellingson, at the time you had a discussion with him, infer that the company was concerned with jurisdictional disputes between the Brotherhood and the IWA?

A. That was the only discussion I had with him concerning the union.

Q. (By Mr. Maxwell): Was the subject of the jurisdictional dispute mentioned at that time?

A. No, I don't believe there was. [115]

Q. Had you withdrawn from the IWA?

A. I had.

Q. Did Mr. Ellingson indicate that he was afraid that the IWA would make a jurisdictional dispute out of the men getting into the Brotherhood?

A. He didn't state anything of that kind.

(Testimony of Earl Wood.)

Q. Did he indicate that the dispute, or that there was a controversy between the two unions?

A. No.

Q. (By Mr. Maxwell): Did he say the company was concerned as to whether or not there was or would be a jurisdictional dispute?

A. No, he didn't say that; he said just exactly what I said.

Q. What did he say?

A. He said that if there was any trouble that arose, that we would shut the whole thing down.

Q. The trouble from whom? Whom would the trouble be raised by?

A. He didn't state that.

Q. Did he indicate—did he say that the company would shut the whole thing down if there was any trouble? A. No, he did not.

Q. What did you say about this trouble?

A. I said I didn't think there was any call for anyone getting [116] scared about trouble, because the men didn't want trouble any more than the company did.

Q. Did Mr. Ellingson ask you whether or not the CIO had threatened to make any trouble?

A. No, sir; he did not.

Q. Did Mr. Ellingson say that if the men joined the Brotherhood, they would shut the plant down? A. No, sir.

Q. Did he say they would curtail the company's operations? A. Not at all.

(Testimony of Earl Wood.)

Q. Did he threaten to take any action against you for having joined the Brotherhood, or for having an intention of joining the Brotherhood?

Mr. Walker: I object to that as calling for a conclusion.

Trial Examiner Kent: Read the question.

(Thereupon, the pending question was read aloud by the reporter as above recorded.)

Mr. Walker: It seems to me that he is dealing in probabilities and speculation.

Trial Examiner Kent: The answer may be taken.

A. Well, I think that would be a matter of judgment, whether it was a threat.

Q. Did he say that he would fire you?

A. No.

Q. Did he say that he would suspend you? [117]

A. No.

Q. Did he tell you not to join?

A. No, he didn't tell me not to join.

Q. Now, you have been an engineer since 1922 on the Polson line? A. Yes.

Q. Were there any safety rules or regulations in effect? A. No.

Q. No safety rules or regulations?

A. No.

Q. Did anyone ever tell you or instruct you in regard to safety?

A. Well, nothing more than blowing the whistle, being careful to blow the whistle plenty at the crossings.

(Testimony of Earl Wood.)

Q. As you approached the crossing, did you look ahead for the head brakeman or the second brakeman on the crummy? A. Yes.

Q. What was the occasion for you looking ahead on the crummy to see the second brakeman or the head brakeman?

A. I didn't look at them so much as the road, because I was watching the road, because they didn't have anything to do with the operation of the train; I had the full operation of the train.

Q. You mean, you could start and stop?

A. Yes. [118]

Q. That starting and stopping was from the engine? A. Yes.

Q. You would look ahead on the crummy, and you would watch for a signal from the head brakeman?

A. I didn't look at them so much as the road; the road is what I watched.

Q. Did you look for the second brakeman,—you had a second brakeman on the trains, also?

A. Yes.

Q. Did you watch for a signal from him?

A. I watched for all signals, of course.

Q. That was the regular thing?

A. There was nothing about a rule to that effect.

Q. But that was what was done? A. Yes.

Q. The crummy cars are not equipped with air brakes?

(Testimony of Earl Wood.)

A. No; the air is cut out on them.

Q. On what runs have you worked as an engineer? What runs have you pulled?

A. I have pulled all of them.

Q. When did you last work on the run from Railroad Camp to Camp 6?

A. This last week.

Q. Prior to May 21, 1940?

A. Oh, I have worked on all of them; I couldn't state just [119] when.

Q. Were you ever instructed to blow the whistle at a crossing? A. Oh, yes.

Q. Handing you what has been marked for identification as respondent's Exhibit No. 1, I will ask you if you have ever seen that before? Not that exact copy, but a set of standards?

Mr. Walker: Again, I object to this unless counsel limits it to a period prior to May 21, 1940.

Q. (By Mr. Maxwell): Yes, prior to May 21, 1940, counsel, if that will help you.

A. I have never seen this before (indicating).

Q. Did you ever see a pamphlet or a booklet like that? A. Not that I know of.

Q. Were you ever given one? A. No, sir.

Mr. Maxwell: Your witness.

Redirect Examination

[120]

Q. (By Mr. Walker): In crossing a crossing, when you see an emergency arising, do you depend on a signal from the brakeman?

(Testimony of Earl Wood.)

A. No; I depend on my judgment. If I waited for a signal from the brakeman, there might be something happen.

Q. When you are crossing a crossing and an emergency arises, and you get no signal from the brakeman, what do you do?

A. I stop, if necessary.

Q. Even without a signal? A. Yes, sir.

Q. Has Mr. Ellingson ridden on a crummy attached to your train?

A. Lots of times. [121]

Q. (By Mr. Walker): In crossing crossings, does your brakeman always ride outside of the crummy or inside of the crummy?

A. He is always outside when crossing crossings.

Q. Has Mr. Ellingson ever been on the crummies with the brakeman? A. Yes.

Q. Is there an angle cock on the crummy?

Q. (By Mr. Walker): You testified on cross-examination that there is an air line through the crummy? A. Yes.

Q. And there is an angle cock on the crummy?

A. Yes.

Q. Can the brakeman stop the train from the crummy by operating the air line?

A. Yes, he can by lying down and opening the angle cock, or the hose or the train line.

Mr. Walker: That is all.

Recross-Examination

Q. (By Mr. Maxwell): Where is the angle cock?

(Testimony of Earl Wood.)

A. Do you mean where it is? [122]

Q. Yes.

A. It is a line which couples between the two box cars. It is just above the hose, just where the hose connects on to the pipes; there is an angle cock there.

Q. About how far below the surface of the crummy car is that?

A. That would be probably sixteen or eighteen inches.

Q. That would not stop the train unless the air line is connected with the engine?

A. The air is connected with the engine.

Q. It would not stop it unless it was connected with the engine?

A. No, it would not.

Q. As you approach the crossing, do you approach with your train under control?

A. Yes.

Q. On which side of the engine are you on?

A. Right side.

Q. The right side as the engine moves in a forward direction, normally?

A. Yes.

Q. If the engine were backing up, you would be on the left side?

A. Yes.

Q. At these crossings you have a clear, unobstructed view to your right as you face the crossing, going backwards? [123]

A. Yes.

Q. Always at all crossings?

A. Yes.

Q. If a car was coming, if you hadn't seen it, would you also rely on the brakeman to give you a signal?

(Testimony of Earl Wood.)

A. Yes; I would expect him to look, also.

Q. You would also expect him to look?

A. Yes.

Q. If he gave you a signal, what kind of a signal would he give you?

A. He would give me the wash-out.

Q. That is with both hands turned down to his sides? A. Yes, to stop it.

Q. Will you describe it?

A. A wash-out is like this (indicating). He would hold his arms extended, and then he would flop them down, both of them, quickly; that is a wash-out.

Q. In other words, the arms extended and dropped quickly? A. Yes.

Q. He might do it two or three times?

A. Yes, he might.

Q. And if you did get a signal from him to stop, you would stop right away?

A. Right away.

Q. You wouldn't depend on your own faculties?

[124]

A. No, I would depend upon the brakeman as well as myself.

Mr. Maxwell: That is all.

Redirect Examination

Q. (By Mr. Walker): Are the air lines on all the Polson crummies connected with the engine?

A. Yes, they are. [125]

Proceedings

Trial Examiner Kent: The hearing will be in session.

Mr. Maxwell: Mr. Examiner, Board's Exhibits 7 and 8 for identification were rejected on the grounds that they were not properly identified. We have checked against the company files, in the office, Board's Exhibits 7 and 8, as offered yesterday, or, rather, copies of them; and we find that they are the same. If Mr. Walker wants to put Mr. Polson back on the stand to identify them, all right. We are not going to object on the grounds of improper identification or insufficient identification. I do not, however, want to waive my objection as to the materiality of these exhibits.

Trial Examiner Kent: Very well. Do you want to reoffer them?

Mr. Walker: Yes, I will do that, Mr. Examiner. Based upon Mr. Maxwell's statement concerning the identification of the same, Board's Exhibit 7 and 8 are now reoffered.

Trial Examiner Kent: They will be admitted.

Mr. Maxwell: I do not waive my objection to materiality.

Trial Examiner Kent: Subject, of course, to your objection as to materiality.

(Whereupon the documents heretofore marked Board's Exhibits 7 and 8 were received in evidence.) [129]

BOARD'S EXHIBIT NO. 7

August 14, 1935.

To Our Employees:

For the purpose of reestablishing the friendly relations that have existed between our companies and their employees, we submit the following as a basis for resuming operations:

(1) (a) We agree to negotiate with a committee of our own employees elected by our employees who are members of Local No. 2639, United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor for collective bargaining purposes for its employee members.

(b) We agree to negotiate with any individual committee, or committees of our employees for collective bargaining purposes for the employees whom they represent.

(c) Any general change in base pay or hours of work will apply to all employees.

The above committee must be employees of the lumber manufacturing plants and logging operations of each individual company for one year or more.

The following holidays shall be observed: Sundays, Fourth of July, Labor Day, Armistice Day, Thanksgiving Day, and Christmas.

Working days will be the regular eight-hour day, five days per week, or forty hours per week.

Overtime to be paid on straight production in excess of eight hours per day at the rate of time and

one-half, excepting train crews and other jobs to be worked out with the committee. Complete regulations for overtime work to be worked out as soon as possible by the committee and management on resuming operations.

The basic rate of pay shall be 50 cents per hour for common labor. Those companies having a basic rate of 45 cents at the time operations closed will increase wages in the higher brackets 5 cents per hour. Those companies having a base rate of 42½ cents at the time operations closed will increase wages in the higher brackets 7½ cents per hour. Piece work will be adjusted in accordance. These wages to remain in effect as long as economic conditions will permit. No change will be made without first being taken up with the committee and management.

We agree to negotiate with a safety committee of our employees elected by our employees on safety conditions in our operations.

No strike shall be caused or sanctioned by the union and no lockout shall be entered upon by employers until every peaceable method of settlement shall have been tried. At no time shall employees be required to act as strikebreakers, go through picket lines or armed guards or handle any forest products declared unfair by any organization affiliated with the American Federation of Labor.

All men who were employed on May 6, 1935 shall have the privilege to return to their former positions without discrimination.

We expect our former employees to report for duty on the date of opening operations or within 10 days thereafter. Failure to do so unless for unavoidable reasons will forfeit the right of said employees to reinstatement.

BOARD'S EXHIBIT NO. 8

Exhibit B

For the purpose of re-establishing the friendly relations that have existed between this company and its employees, we submit the following as a basis for resuming operations:

1. To immediately select, appoint and keep in its employ a personnel and labor relations officer who is to meet with the Shop Committee.

2. To re-employ all men who were on the payroll October 27th, 1936, without discrimination. Also to give preference to local men. To re-employ nine (9) men employed in the shop and laid off approximately sixty (60) days before October 27th, 1936, when men are hired for the same positions.

3. To furnish fresh milk immediately at no extra cost and to make living conditions in the camps comparable to living conditions in the camps in this district without unreasonable delay.

4. To re-establish the use of a call board in so far as practical and so long as present system continues, and to equalize as far as practical working hours of trainmen.

5. The Blanket Agreement is confirmed.

6. All men on the payroll on October 27th, 1936, are expected to report for duty on the date of opening operations or within ten (10) days thereafter. Failure to do so unless for unavoidable reasons will forfeit the right of employees for reinstatement.

Dated this 11th day of February, 1937.

POLSON LOGGING COMPANY

By THEODORE B. BREUNER

Secretary

By F. A. POLSON

Manager

DAVE LYTLE

(resumes the stand)

Cross Examination

(continued)

Q. (By Mr. Maxwell) At the meeting testified to by you on May 18, 1940, at which you presented which is Board's Exhibit No. 4 to Mr. Polson, was any question raised as to what was the appropriate bargaining unit?

A. Mr. Polson stated that a craft union would be apt to give us a jurisdictional dispute.

Q. Was any question raised as to whether or not a single bargaining unit had been established by past practice and dealings? Was that discussed?

A. I don't understand your question.

(Testimony of Dave Lytle.)

Q. How is that?

A. I don't understand your question, just exactly.

Q. Well, on May 21, 1940, and prior thereto, were all the logging employees—employees of the logging operations of the Polson Company,—bound together in a single group for the purpose of collective bargaining?

A. Well, that would be pretty hard for me to say, because I never saw the membership list; so I couldn't tell you whether they belonged to the I. W. A. or not. [130]

Q. You misunderstand my question. Did the I. W. A. represent all of them for the purpose of collective bargaining? You understand that they do not have to be members to be represented, if the majority of the employees selected the I. W. A.

A. Yes, I believe they were.

Q. And prior to May, 21, 1940, the Trainmen were represented by the I. W. A. were they not?

A. Well, the Trainmen were not represented by anybody.

Q. Did you belong to the I. W. A.

A. In 1921.

Q. No.

A. I mean, prior to May 21, 1921.

Q. Not 1921. A. May 21?

Q. 1940. A. 1940?

Q. Did you belong? A. No, I did not.

Q. Did the other Trainmen belong?

(Testimony of Dave Lytle.)

A. Some of them did.

Q. The employees of the Polson Company were considered as constituting a single unit for the purpose of collective bargaining; is that correct?

A. Yes, I believe they were. [131]

Q. Didn't Mr. Polson state to you that the unit for bargaining, as identified by past practice and contract was an industrial unit? A. He did.

Q. And didn't he say that he doubted whether the company could change the bargaining unit without the approval of the [132] National Labor Relations Board? A. Yes.

Q. And didn't Mr. Polson suggest that if the I. W. A. was willing to relinquish their claim to represent the Trainmen and Engineers, the company's position regarding the bargaining unit,—that the company might be able to make a more definite decision? A. No.

Q. Did he suggest to you that you ask the I. W. A. if they were willing to relinquish their claims? A. No.

Q. Mr. Lytle, what was done when a train approached a crossing, when the engine was backing up, that is, pushing ahead of it the trucks, in the direction it was going,—strike that. What was done when a train approached a crossing when the engine was backing up, that is, pushing ahead of it, in the direction it was going, the crummy car and several empties? What did you do when the engine was backing up, pushing the crummy car,

(Testimony of Dave Lytle.)

and ahead of the crummy car there were several empties, as they approached the crossing?

A. Well, it would be up to the trainman's judgment as to what they did.

Q. What would the brakeman do?

A. As I said, that would be up to the brakeman's judgment as to what was done. [133]

Q. Did they ordinarily stop the train?

A. Some of them might have stopped the train and flagged the crossing.

Q. Did they flag the crossing?

A. Some of them might have.

Q. Were you ever the brakeman on a train that was backing up, pushing the crummy and several empties ahead of it, crossing a crossing?

A. Yes.

Q. And what did you do?

A. That has been so long ago that I have almost forgotten. I suppose, if it was a long drag, I would stop and get out and flag the crossing.

Q. Where did the head brakeman ride under the circumstances stated?

A. What do you mean?

Q. Where they were pushing the crummy and several empties, where did the head brakeman ride?

A. That depends on the,—he might ride the point.

Q. What point?

A. The point of the empties; that would be on the first one that crossed the crossing.

(Testimony of Dave Lytle.)

Q. Where else might he ride?

A. He might ride two or three cars behind the point.

Q. Generally, was his position toward the head end of the [134] direction toward which he was moving?

A. That was up to him.

Q. If he was on the crummy car, and there were 7 or 8 empties ahead, where would the second brakeman be?

Mr. Stevens: Does counsel have in mind any and all crossings or just this particular crossing?

[135]

Mr. Maxwell: A main highway crossing.

The Witness: The second brakeman would be on the crummy car unless told by the head brakeman to go out, I suppose.

Q. (By Mr. Maxwell, continuing) Then, if you had several empties ahead, and the first brakeman was not out there, he would instruct the second brakeman to be out there on the first car or on the front end?

A. I can't answer for somebody else. How am I going to answer what somebody else is going to do? [136]

“Then, if you had several empties ahead, and the first brakeman was not out there, he would instruct the second brakeman to be out there on the first car or on the front end?”)

Trial Examiner Kent: Well, I think a fair interpretation would be his practice; how you operated when you were on the train.

(Testimony of Dave Lytle.)

The Witness: When I was on the train, I had to use my own judgment.

Q. (By Mr. Maxwell, continuing) If you were not on the front end, did you instruct the second brakeman to ride out there as they approached the crossing? A. If there was any necessity.

Q. What do you mean by "If there was any necessity."?

A. It is a kind of confusing question, Mr. Maxwell.

Q. It is a confusing answer, and I am asking you to clarify it.

Trial Examiner Kent: Now, what do you consider a necessity? [138] What do you mean by "necessity"? What is your explanation?

The Witness: Well, if I thought there was any danger of trouble, I would instruct him to go out there.

Mr. Maxwell: What do you mean by "any danger of trouble"?

The Witness: Any danger of running over anybody or anything.

Q. (By Mr. Maxwell, continuing) Well, when would you give that instruction?

A. It would naturally be given before there was,—before it came to a point where there would be any trouble.

Q. Well, what is the first crossing on the main highway after you leave the railroad camp, in a westerly direction? A. Axford Prairie.

(Testimony of Dave Lytle.)

Q. And when you give instructions to the second brakeman,—strike that. When would you give that instruction to the second brakeman with respect to the time the train left railroad camp?

A. I would give it to him before reaching the crossing.

Q. While the train was going? A. Sure.

Q. How far in advance of reaching the crossing?

A. Time enough to get out there to the point.

Q. And what was the purpose of having him get out to the point? What would be the purpose?

A. That means the head end of the train. [139]

Q. That means the head end of the train in the direction in which the train is moving?

A. To see if everything is clear.

Q. And what was his duty if the crossing was not clear? What would be his duty if the crossing were not clear?

A. It would be to flag the engineer.

Q. And what would be his duty if he saw an automobile coming down the highway pell-mell?

A. It would be to flag the engineer, I suppose.

Q. Now, what was done when the engine was pushing the crummy ahead, but pulling the empties behind, as they approached the main highway crossing? What did the trainmen do?

Mr. Walker: I object to that. That is one of those general shotgun questions.

(Testimony of Dave Lytle.)

Trial Examiner Kent: I think it should be limited to his practice,—to his train.

Mr. Maxwell: Well, Mr. Examiner, I am entitled to a wide range in my cross examination; this witness has testified that he started in as a second brakeman, and that he has worked as a head brakeman and second brakeman; so his knowledge is not limited necessarily to what he would do as a head brakeman; and the complainants and the Board have alleged that we have discharged this man because of membership or activity on behalf of the Brotherhood. We have answered that the reason for the discharge was the violation of the safety standard rules, [140] or safe operations of the train; so, I think he is qualified to answer the question, particularly due to the fact he has worked as a second brakeman and has worked as a head brakeman.

Mr. Walker: In any event, it would still be limited to what he did on his train. He has absolutely no control over what the enginemen would do on the trains that he would work; that would be the duty of the trainmen,—that would be the duty of the enginemen. He could only testify as to what his experience has been in the operation of his train.

Trial Examiner Kent: I would think so, unless the question is so directed that,——

Q. (By Mr. Maxwell, continuing) What did you do as the train approached the crossing, pushing the crummy but pulling several empties?

(Testimony of Dave Lytle.)

A. I rode on the crummy.

Q. And where in the crummy did you ride?

A. That would depend on the weather.

Q. Did you flag the crossing?

A. No; there is no set rule to flag the crossing.

Q. You didn't flag the crossing? A. No.

Q. If the sun was shining, did you flag the crossing?
A. No.

Q. If it was foggy, did you flag the crossing then?
A. No. [141]

Q. You did not? A. No.

Q. You did not flag the crossing? A. No.

Q. Did you instruct your second brakeman to flag the crossing? A. No.

Q. Did the second brakeman,—did your second brakeman flag the crossing? A. No.

Q. On the 21st of May, 1940, what run were you on?
A. I was on the Camp 2 run.

Q. And where does that go from.

A. It goes from Railroad Camp to Camp 2.

Q. Does that run across the main highway, the Olympic highway? A. Yes.

Q. Is that the Axford Prairie crossing?

A. Yes.

Q. Did you flag the Axford crossing on the 21st of May of 1940? A. No.

Q. Did you instruct the second brakeman to flag the Axford crossing? A. No.

Q. Did he flag the Axford Crossing?

A. No. [142]

(Testimony of Dave Lytle.)

Q. Where were you riding?

A. In the crummy.

Q. Where in the crummy?

A. By the window..

Q. Inside the dog-house?

A. Inside the dog-house.

Mr. Stevens: Does counsel have in mind the first trip, the second trip, or all trips that day?

Mr. Maxwell: The morning trip, going out.

Q. (By Mr. Maxwell, continuing) Your testimony related to the morning trip, going out?

A. Yes, to the morning trip.

Q. Did you cross that crossing again that day?

A. Yes.

Q. Going out? A. Yes.

Q. Was the crummy ahead of the engine?

A. We were shoving it.

Q. Did you flag the crossing on the second trip?

A. No.

Q. Did the second brakeman flag the crossing on the second trip? A. No.

Q. Did you instruct the second brakeman to flag the crossing on the second trip? [143] A. No.

Q. Did you make more than 2 trips that day?

A. 2 trips is all.

Q. You have worked as a second brakeman?

A. Yes.

Q. When you first went to work for Polson on the railroad you worked as a second brakeman?

A. Yes.

(Testimony of Dave Lytle.)

Q. Did you work on the run that crosses the main highway? A. Yes.

Q. Who was your head brakeman?

A. Different ones.

Q. Did they flag the crossing? A. No.

Q. Who were they?

A. That has been a long time ago.

Q. How long ago was it? A. 1934.

Q. Who did you start out with? Who was your head brakeman when you started out?

A. I have got to think now. I think it was W. J. Williams; I think W. J. Williams was the one.

Q. He is still with the company, is he?

A. Yes.

Q. And who was the next? [144]

A. C. B. Groves.

Q. Who was the next one?

A. I believe it was Wirt Thomas.

Q. Is he still with the company? A. He is.

Q. (By Mr. Maxwell, continuing) Who else have you worked with, besides Groves, Williams and Thomas?

A. I believe the next one was on our work train. I was out alone on that, if I remember right. That was a long time ago. There was only one brakeman on the work train.

Q. Have you worked as a second brakeman since 1937,—January 1937? A. Yes.

Q. When was that?

A. Well, at different times when crews were working, mixed-up; when things were slack.

(Testimony of Dave Lytle.)

Q. You have worked as a second brakeman then?

A. Yes. [145] ,

Q. Who were your head brakemen?

A. I don't know now. The way they were mixed-up, we were working around amongst ourselves; that is a pretty hard proposition.

Q. Can you recall any of them?

A. The same men that I named.

Q. Williams, Groves and Thomas?

A. Well, I suppose, yes.

Q. Is W. J. Williams known as "Red" Williams?
A. Yes.

Q. Did he flag the crossing? A. No.

Q. Did he ever instruct you to flag the crossing?

A. No.

Q. Did C. B. Groves flag the crossing?

A. No.

Q. Did he ever instruct you to flag the crossing?

A. No.

Q. Did Wirt Thomas flag the crossing? [146]

A. No.

Q. Did he ever instruct you to flag the crossing?

A. No.

Q. Am I correct that since 1934 you have never flagged a main highway crossing? Is that correct?

A. Yes.

Q. You have never been instructed to flag a main highway crossing?

A. No; I want to know if that is this crossing or all crossings?

(Testimony of Dave Lytle.)

Q. A main highway crossing.

A. You mean main highway crossings?

Mr. Walker: All main highway crossings, I suppose, he means.

Mr. Maxwell: That is what I said, "main highway".

The Witness: Can you scratch that?

Mr. Maxwell: No.

Trial Examiner Kent: You may answer the question. If you think you haven't answered it fully, go ahead and explain it.

The Witness: Well, I have already answered it.

Trial Examiner Kent: That is all right. You can explain what you mean.

The Witness: That flagging the highway crossing,—I have flagged highway crossings at night, different crossings.

Q. (By Mr. Maxwell, continuing) Main highway? [147] A. Yes.

Q. Did you do that when you were head brakeman? A. I did.

Q. Did you do it when you were second brakeman? A. No.

Q. Were you instructed to flag main highway crossings at night?

A. I was instructed to flag two highway crossings at night.

Q. What two? A. Out at Cook Creek.

Q. Main highway? A. That is right.

Q. How are those crossings designated?

(Testimony of Dave Lytle.)

A. By a main highway sign.

Q. Axford Prairie crossing, is that one of them?

A. No, that is not out at Cook Creek.

Q. What highway was that?

A. Olympic highway [148]

Q. Do those crossings have any other designation such as "Crossing No. 2," for instance?

A. I believe they call them Crossing No. 2—No, Crossing No. 3 and Crossing No. 4.

Q. And who instructed you to flag those crossings?

A. Mr. Alex Polson,—Mr. A. M. Polson.

Q. And when was that instruction given, about?

A. Oh, somewhere in 1937.

Q. What did Mr. Alex Polson say at that time, as near as you can recall?

A. He told me to flag No. 3 and No. 4 crossings at night; when we were on the night job, hauling nights, to flag a train as it would go by the crossings. He told me to go to the front end, get off and flag the train and catch the tail end.

Q. Did he say anything about flagging Crossing No. 1, which has been referred to as the Axford Prairie Crossing? A. No.

Q. Did he say anything about flagging Crossing No. 2 at the Olympic Highway? A. No.

Q. Did he say anything about flagging Crossing No. 5? A. No. 5?

Q. Yes. A. I have never heard of it.

(Testimony of Dave Lytle.)

Q. No. 4 has been taken out, and what you have designated, [149] perhaps, as No. 5,—what you have designated as No. 4, perhaps, is No. 5.

A. Where is No. 5?

Q. The crossing going into the Indian Reservation at Ozette.

A. Is that No. 5?

Q. What is the other one this side of it?

A. No. 3.

Q. No. 4 has been taken out.

A. There is no No. 4, then?

Q. That is right.

A. What is the question again?

Q. Did he say anything about flagging Crossing No. 5?

A. No. Oh, No. 5?

Q. Yes. Let us get your answer clearly. When you refer to No. 4, you are referring to the Ozette Crossing, which is designated as No. 5?

A. I believe so.

Mr. Walker: Let us start with No. 1 and describe them all the way up. Maybe he doesn't understand them by number.

Q. (By Mr. Maxwell): How long have you worked on the railroad?

A. Since 1934.

Q. What other designation does the Axford Prairie Crossing have?

A. It is always referred to as the "Prairie."

Q. It is referred to as No. 1? [150]

A. It could be; it is the first crossing.

Q. Do you recall in 1937 and 1938, the second crossing from Railroad Camp, on the main Olympic Highway, was taken out?

A. Yes.

(Testimony of Dave Lytle.)

Q. And then the third crossing west from Railroad Camp is designated how?

A. It would be No. 3.

Q. Does that have any other designation?

A. Not that I know of.

Q. Did you ever hear it referred to as Crossing No. 3? A. Yes.

Q. Do you recall the fourth crossing—do you recall whether the fourth crossing west of Railroad Camp in 1934 was taken out, sometime subsequent to that, in 1935 or 1936?

A. Yes; that is the one that led off below Cook Creek?

Q. That is right. A. That is right.

Q. That was taken out? A. Yes.

Q. And the No. 5 crossing,—

A. (Interposing): That is still there.

Q. That is the Indian Reservation at Ozette; that is the crossing there? A. Yes.

Q. Now, you referred to crossings No. 3 and No. 4. [151]

Q. Was Mr. Alex Polson riding with you on that occasion? A. No.

Q. What was the occasion of his instructing you?

A. That they had had a crossing accident on the No. 3 crossing.

Q. And you were on that train? A. I was.

Q. And when did that accident occur?

(Testimony of Dave Lytle.)

A. That was somewhere along in the fore part of 1937; I don't recall the exact date.

Q. That was a crossing accident?

A. It was.

Q. Was Mr. Polson's statement made to you following the accident?

A. I don't recall whether it was made following the accident, or right there.

Q. Well, it was not made before the accident?

A. It was not made before the accident.

Q. What was your job on the train?

A. Head brakeman.

Q. What did you tell Mr. Polson when he told you to flag the crossing?

A. What crossing are you referring to, now?

Q. No. 3 and No. 5.

A. I told him I would.

Q. Had you stopped the train that night on approaching the [152] crossing?

A. Do you want me to explain that accident, how it happened, or just how it went?

Q. I want to know if, on approaching the crossing that night, you stopped the train.

A. No.

Q. Did the engineer, without receiving a signal from you, stop the train?

A. I was right behind the locomotive.

Q. You were behind the locomotive?

A. I was on the locomotive.

Q. And the engineer stopped the train?

(Testimony of Dave Lytle.)

A. He slowed down.

Q. How slow was he going?

A. Possibly 10 miles an hour.

Q. And did you look across the crossing?

Mr. Walker: Mr. Examiner, I object to this line of examination on the ground that it is incompetent, irrelevant, and immaterial. It is all very interesting, but I can't see how the history of an ancient accident in 1937 could possibly help us in this case. The respondent does not allege it, nor is there any connection with an accident made in the answer of the respondent. I can't see its materiality.

Mr. Maxwell: This witness once testified that he was never instructed before. [153]

Q. (By Mr. Maxwell, continuing): Did you flag the crossing? A. No.

Q. Who was the second brakeman?

A. Al Latonville.

Q. Al Latonville? A. Yes, sir.

Q. Since 1937, has Bennett Ellingson ever talked to you about flagging a crossing? A. No.

Q. He never did? A. No.

Q. Did he at any time?

A. From 1937 to date?

Q. At any time. A. In 1937, he did.

Q. When was that? [154]

A. One night I got out to flag No. 3, flagging with a load at night.

Q. And what did he say?

A. He told me not to flag the crossing any more.

(Testimony of Dave Lytle.)

Q. When was that?

A. I don't recall the date, but he said it took too long.

Q. Was that before or after the accident?

A. After.

Q. Did he refer to any other crossing?

A. Just No. 3.

Q. Now, on this night the accident occurred, were you pushing the crummy ahead of the train?

A. No; we were pulling everything; the locomotive was headed in the other direction.

Q. When did you first see Mr. Bennett Ellingson on May 21?

A. When he whizzed around this side of the gas station, this side of No. 1 crossing.

Q. And where was he? A. In his car.

Q. Where is this gas station?

A. At Axford Prairie.

Q. Did he cross ahead of the train?

A. He did not.

Q. What did he do?

A. He stopped there by the crossing. [155]

Q. Had you ever seen Mr. Ellingson at any crossing prior to that date when the train went by?

A. Yes.

Q. And when was that?

A. Oh, that was different times.

Q. And afterwards, Mr. Ellingson was out at the crossings as the trains crossed over at different times? A. Yes.

(Testimony of Dave Lytle.)

Q. And that was No. 1 crossing?

A. I don't recall seeing him at No. 1 crossing.

Q. No. 3? A. Not No. 3.

Q. No. 5? A. No. 5, yes.

Q. And that was in the night time?

A. Daytime.

Q. Did you see him at any of the crossings at night? A. No.

Q. When did you next see Mr. Ellingson on the 21st?

A. I didn't see Mr. Ellingson again on the 21st.

Q. Where were you standing on the crummy car, on the 21st?

A. I was standing next to the window.

Q. Which window?

A. The left-hand side; the engineer's side.

Q. What time of day was it? [156]

A. Approximately about 5:30.

Q. In the morning? A. In the morning.

Q. And now, assuming, during the day or daylight hours, the train was proceeding in a westerly direction approaching Highway Crossing No. 1, and the crummy was being pushed ahead of the engine, and a car was coming, or an emergency arose that you thought made necessary the stopping of the train, and you wanted to stop the train, what would you do?

A. I would flag the engineer, if the necessity arose.

Q. And what kind of a signal would you give him? A. I would give him a stop signal.

(Testimony of Dave Lytle.)

Q. Well, demonstrate and we will describe it.

A. (Witness indicating.)

Q. Just one hand?

A. One hand is all that is necessary.

Q. What is a stop signal? Just illustrate.

A. One hand up, or two hands, either one.

Q. You just hold them out and let them drop?

A. That is right.

Q. And if the engineer did not respond to your signal, what would you do?

A. I would pull the air on him.

Q. On the crummy car?

A. Sure, if I could get down and get it. [157]

Q. Where is the air on the crummy car?

A. It is on the end.

Q. On which end? Is it toward the end the train is moving?

A. On the opposite end from the locomotive.

Q. That would be the front end of the crummy car?

A. Yes.

Q. It is the end opposite the dog house?

A. Yes.

Q. That is, the end of the crummy car to which you would have to move to set the air?

A. Yes.

Q. Who has worked as second brakeman with you since 1937?

A. Clayton Reece.

Q. He is one of the complainants in this action?

A. He is.

Q. Who else?

A. Cecil Blankenship.

(Testimony of Dave Lytle.)

Q. Is he still with the company?

A. That I couldn't say.

Q. Who else? A. Mack Ledbetter.

Q. Is Ledbetter still with the company?

A. I couldn't say as to that, whether he is or not.

Q. Anyone else that you can recall? Do you recall anyone else? [158]

A. I don't recall anybody off-hand.

Q. Did you ever work as head brakeman or second brakeman with Grosclouse?

A. I don't recall whether I made any trip with Shorty or not.

Q. Did you ever make any trip with Heck?

A. I might have; that is so long ago it is hard to tell. You get mixed up so much; we are working around here and there.

Q. (By Mr. Maxwell): Where was Mr. Ellingson when you saw him on the 21st?

A. In his car.

Q. How? Was he sitting in his car at the crossing? A. Going by it.

Q. Did you see him at the crossing?

A. Yes.

Q. Where was he then?

A. He was out at the side of his car. [159]

C. B. GROVES

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Walker:

Q. Are you employed at the Polson Logging Company? A. Yes.

Q. In what capacity? A. Brakeman.

Q. How long have you been a brakeman for the Polson Logging Company?

A. I went to work November 26, 1926.

Q. From November, 1926, have you been employed as a brakeman at all times?

A. No; there was two months of that time I was running the speeder. [160]

Q. Except for those two months, have you been employed as a brakeman at all times?

A. That is right.

Q. Now have you received any instructions at all from anybody connected with the company concerning the safe operation of the train?

A. No, I never did.

Q. Has anybody connected with the company told you whether or not there were any rules or regulations pertaining to the operation of trains?

A. No.

Q. Do you know Vic Lehman? A. Yes.

Q. Do you know Bennett Ellingson?

A. Yes.

Q. In April, 1940, what work were you doing?

(Testimony of C. B. Groves.)

A. Well, in April I was switching at Camp No. 2 a part of the time; a part of the time I was at Camp 6; I don't know which part it was.

Q. Are you a member of any labor organization?

A. Yes.

Q. What organization?

A. I am a member of the Brotherhood of Railroad Trainmen.

Q. How long have you been a member of it?

A. Since 1923. [161]

Q. Now, in April, 1940, did you have a conversation with Mr. Vic Lehman? A. Yes.

Mr. Maxwell: Let us establish who Vic Lehman is, please.

Q. (By Mr. Walker): In April, 1940, where was Mr. Lehman employed?

A. He was running Camp No. 6 for the Polson Logging Company.

Q. And what do you mean when you say he was running Camp?

A. He was the head man; the push.

Q. What conversation did you have with him at that time?

Mr. Maxwell: I will object to that on the ground that it is incompetent, irrelevant, and immaterial, there being no showing that Vic Lehman was authorized to speak for the company with regard to the Brotherhood, or with regard to any matter that is in issue in this case; he was not shown to be an officer. [162]

(Testimony of C. B. Groves.)

Trial Examiner Kent: What is the question?

Mr. Walker: The question is what conversation was had with Mr. Lehman.

Trial Examiner Kent: The answer may be taken.

Q. (By Mr. Walker): Will you go ahead and describe the conversation?

A. Well, he came out of the kitchen that day, and we were just pulling out. And he came out to me and said, "I want to see you." I said, "All right." So we stepped aside, between the [163] office and the steps going into the kitchen. He said, "I have known you a long time." I had worked with him for many years. He said, "I have known you for a long time, and I just want to say you had better be careful what you say about the Brotherhood; somebody is going to be let out, and it might be you." And I said, "I don't think so."

Q. (By Mr. Walker): Had you seen Mr. Ellingson around Camp 6 that day?

A. No; I had left early in the morning, and I just got back.

Mr. Maxwell: I move to strike this testimony on the ground that Vic Lehman was not authorized,— on the ground that there is no showing that Vic Lehman was authorized to speak for the company; there is no showing that he was an officer of the company, and there is no showing that Vic Lehman has the power to hire and fire; and there is no showing that Vic Lehman had at any time worked in a supervisory capacity over the train crews.

(Testimony of C. B. Groves.)

Trial Examiner Kent: I will reserve ruling on the motion to strike.

Mr. Maxwell: If the Examiner please, I would like to also move to strike,—No, never mind. That is all.

Cross-Examination

Q. (By Mr. Maxwell): Is Vic Lehman still with the company?

A. I don't think so; I have not seen him for sometime. [164]

Q. For how long?

A. I have not seen Vic Lehman since last May, because he was working up in the hills, and when I went up there he was gone then. I have not seen him since he was transferred out at Camp 6.

Q. Did Mr. Lehman say where he got the information?

A. He didn't say where he got it, but, being a friend of mine, he told me to watch myself.

Q. Did you ask him where he got it?

A. I figured he would tell me if he wanted me to know.

Q. You figured he would tell you?

A. Yes, if he wanted me to know.

Mr. Maxwell: I move to strike this testimony on the ground that it is hearsay. The witness has testified as to a conversation with Vic Lehman, who is not authorized to speak for the company, it further appearing at this time that Vic Lehman is no longer an employee of the company, and, so

(Testimony of C. B. Groves.)

far as I know, we cannot find him. That is the most damaging kind of hearsay that can be given, where we have no opportunity to call the witness to refute the testimony.

Trial Examiner Kent: Well, I will hold my ruling in abeyance. I will enter my ruling later.

Q. (By Mr. Maxwell): Do you know where he he is now? A. No, I don't know.

Mr. Maxwell: No further questions. Just a moment. I [165] will take that back.

Q. (By Mr. Maxwell): Who is George Gros-close? A. Shorty Gros-close?

Q. Yes. A. Well, he is——

Q. Well, is he employed at the Polson Logging Company? A. Yes.

Q. And was he so employed in May, 1940?

A. Yes.

Q. What was his position?

A. In May, 1940, he was train master.

Q. Did you ever receive any instructions from him about flagging crossings?

A. No, sir; I never received any instructions from Shorty Gros-close, because he received a lot from me before he went and became train master.

Q. Were you his head brakeman?

A. That is right.

Q. When the train was proceeding across the main highway, pushing the crummy, did you flag the crossing?

A. Depends on what highway.

(Testimony of C. B. Groves.)

Q. The main highway.

A. No. 1 crossing has never been flagged since I have been there, but No. 3 and No. 5 have.

Q. Who told you to flag them? [166]

A. Who told me?

Q. Yes.

A. Well, they were never flagged until someone was killed, unless we were pushing cars.

Q. Unless you were pushing cars?

A. Yes.

Q. If you were pushing cars, did you flag No. 1?

A. That is right.

Q. If you were pushing cars? A. Yes.

Q. How would you flag No. 1?

A. If we had 30 or 40 cars, we would usually stop and flag at the head end, and then jump on as the train went by.

Q. Was that per instructions?

A. That was a form of habit formed years ago; they didn't haul them then, they pushed everything.

Q. How did you start flagging?

A. With my hand.

Q. You testified that they had never flagged prior to 1937.

A. No, I did not; I said when they were pushing cars, they were flagging all the time.

Q. Before 1937? A. Yes.

Q. Were you ever instructed to flag a crossing?

A. No; I was not working as a second brakeman; I was the first [167] brakeman.

(Testimony of C. B. Groves.)

Q. Didn't you start in as a second brakeman?

A. Yes.

Q. Didn't the head brakeman ever instruct you then?

A. No; he didn't tell me, but because he did it, I did it.

Q. On May 21, 1940, where were you working?

A. I think it was at Camp 2.

Q. Did you come to Railroad Camp that day?

A. No, sir.

Q. The next day? A. No.

Q. You did not?

A. When we were working at 2, we tied up there and stayed there sometimes a month at a time.

Q. When you were pushing the crummy, how did you flag the crossings?

A. We didn't flag unless we saw a car coming, and we went out to see if the engineer saw it, and if the engineer saw it, we did not flag.

Q. Where did you flag?

A. We were out on the crummy.

Q. Where on the crummy?

A. Just out by the side of the grab iron.

Q. Where is the grab iron with respect to the dog house?

A. On each side of the dog house. [168]

Q. On the back end?

A. No, on each side.

Q. Near the rear end?

(Testimony of C. B. Groves.)

A. On the side; near both ends.

Q. You said on the side of the dog house.

A. Yes.

Q. That is where you stayed as the train was backing up and moving in a westerly direction?

A. Yes.

Q. You would stand on the south side of the train, and you could see north and south through the dog house?

A. Not through the dog house.

Q. How would you see?

A. By the corner of the dog house.

Trial Examiner Kent: This grab iron is on the corner of the dog house?

The Witness: It runs from the corner about 20 inches, and there is another one in about 20 inches.

Q. (By Mr. Maxwell): The train is moving in a westerly direction pushing the crummy?

A. Yes.

Q. And the dog house would be on the east end of the crummy? A. Yes.

Q. And the engineer would be on the south side of the train? A. That is right. [169]

Q. And the grab iron on the dog house was where with respect to the east end of the dog house?

A. It would be on both ends of the dog house. The bolt goes through on the corner post, about 2 inches from the edge of the dog house—the bolt that holds the grab iron on.

Q. And if the engineer did not respond to the signal, what would you do?

(Testimony of C. B. Groves.)

A. I would probably jump off, if I saw he was going to hit anything.

Q. And then would you make an emergency application of the air?

A. That would be too far. I wouldn't ride the crummy with air cars connected——

Q. Did Mr. Groschlose instruct you about flagging the crossing?

A. One day, when I came in, he said, "You will have to flag the crossing." I said, "All right, I will." And then I said, "I will have to stop the train in order to do it." He said, "No, not to stop the train." I said, "That is the only way you can do it." He said, "You have to flag it, because Bennett said to flag it." I said, "I will stop and flag it." And he said, "Don't stop." And I said, "I can't flag it without stopping."

Q. And where was that—strike that. When was that instruction given with respect to May 1940?

[170]

A. I think it was along in June, 1940, or 1941; no, June, 1940.

Q. Prior to that, had you been instructed?

A. No.

Q. Were you interrogated after May 21 and warned about flagging the crossing?

A. That is the only time I was ever warned, that I remember, except as to No. 3 and No. 5. That is the exception.

Mr. Maxwell: That is all.

(Testimony of C. B. Groves.)

Trial Examiner Kent: If you were to flag the crossing, how would you do it?

The Witness: We would pull up to it, get off and flag it while the train was going by, and catch the other end.

Trial Examiner Kent: You didn't flag the crossings?

The Witness: Sometimes you would have to flag them; however——

Trial Examiner Kent: What did you flag with? Did you use a flag?

The Witness: Sometimes you would have a flag; but, if not, you would just use your hands.

Trial Examiner Kent: That is, giving directions to the engineer?

The Witness: That is right.

Trial Examiner Kent: Of course, if you saw an automobile approaching, you would warn the approaching automobile?

The Witness: Well, you would have to use your own judgment [171] on that, anyway. I don't think any of those engineers are going to run over anybody if they can see them.

Redirect Examination

Q. (By Mr. Walker): What were your instructions concerning crossings No. 3 and No. 5? Was it day or night, or both?

A. We never flagged during the daytime unless we had a work train to shove, with five or six cars, because the No. 3 crossing, right below there,

(Testimony of C. B. Groves.)

is a pretty bad curve. We always protected that, without any instructions; but when we were hauling cars, just on a regular log run—and I was on that job for about seven years and had one accident——

Q. You had one accident? A. Yes.

Q. When was that?

A. It was in 1934; I believe it was in 1934.

Q. Crossing the crossing? A. Yes.

Q. (By Mr. Walker): Was it your instruction to flag the crossing before or after the accident? When were those in- [172] structions given?

A. Either one.

Q. Perhaps you don't understand my question. When were those instructions given?

A. Oh, I don't know when they were first given to us.

Q. Were you to flag the crossing at all times?

A. That was during the time we were pushing cars. It came down from times before. Now, however, in later years, we have been hauling everything, and we could not flag the crossing because the engine was ahead all the time; and we couldn't flag them without stopping. There would be no necessity, because the engine was ahead.

Q. Were you ever told at any time what to do at Crossing No. 3?

A. No. 3 and No. 5. When Mr. Lytle quit, I went back on the same job, and they had been getting off to flag the crossing both ways until the

(Testimony of C. B. Groves.)

train cleared the crossing, and you would have to walk the length of your train; and I came down and asked Mr. Arnold Polson about it, and he said he didn't know what we could do. But he said that he had thought about getting reflectors. And he told me at that time that he heard that the highway was going to put—that the highway department was going to put caution signs out there, and that perhaps we would have to do likewise. So when Mr. Ellingson took the superintendency of the trains, he followed us quite a bit and watched everything, and one day he said, "I don't believe you should [173] stop to flag the crossings when going across the crossings. Just go ahead," and I took it upon myself, that I would light a piece of oil waste as a warning, but I couldn't keep that up during the fire hazard season. I was not told to do that.

Q. Where is the crummy located with reference to the engine?

A. The crummy is a part of the engine; it is attached to the engine, you might say.

Q. Approximately how many cars would you have to have in addition to the crummy when you would flag the crossing?

A. One or more than the crummy; then we would flag the crossings. That was at that time, years ago.

Q. How long has it been since your train has pushed a string of cars ahead of it out of Railroad Camp, heading out of Railroad Camp?

(Testimony of C. B. Groves.)

A. Well, I have not headed out of Railroad Camp with a train, except about a month ago when I hauled gravel for three days. I haven't done that for some time. So I have not headed out of Railroad Camp for five or six months with a train of cars. I don't remember that I have.

Mr. Walker: You mean, when the engine was pushing a train of cars?

The Witness: Yes. That has been a long time, I can't remember when I pushed any cars out of there.

Q. (By Mr. Maxwell): Has it been two or three years? [174]

A. I have pushed cars over the crossing a number of times, but I don't remember whether it was in 1940. I have not been on the job there for some time.

Q. (By Mr. Maxwell): Maybe you misunderstand me. How long has it been since you were on a train that pushed a string of skeletons or disconnected logging trucks out of Railroad Camp?

A. Well, it has been since 1935. Along in 1934 and 1935 they started hauling the cars. They shoved everything up until then. It was 1934 when Morgan came down. He got us to hauling the cars. Before that, we shoved them.

Q. By hauling the cars, what do you mean?

A. I mean the engine would be ahead, with the logs behind, and the engine leading the cars of logs.

Q. And by shoving the cars, you mean what?

A. The engine would be on the other end, pushing them [175]

AFTERNOON SESSION

(Whereupon the hearing was resumed, at 1:30 P.M., pursuant to the taking of the noon recess.)

Trial Examiner Kent: The hearing will be in session.

Mr. Walker: I will call Mr. Wicklund.

JOHN WICKLUND

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Walker) Your name is John Wicklund? A. Yes sir.

Q. You live in Hoquiam, do you?

A. Yes sir.

Q. What is your occupation?

A. Locomotive fireman and engineer.

Q. Have you been employed by the Polson Logging Co.? A. Yes.

Q. When did your employment with them begin?

A. On the railroad or otherwise?

Q. On the railroad? A. 1936.

Q. And since 1936, what railroad work have you been doing on the Polson line?

A. I have been on the Polson line.

(Testimony of John Wicklund.)

Q. You have been an engineer or fireman all the time? [176]

A. Yes; but I ran the speeder for a while.

Q. During all of the time that you have been employed by the Polson railroad service, have you received any instructions from either Mr. A. M. Polson, Mr. F. A. Polson, or Mr. Ellingson on the matter of the safe operation of trains?

A. None other than from Mr. Bennett Ellingson.

Q. What did he tell you?

A. To be sure to sound the whistle before you approach a crossing.

Q. Have you ever been told about any rules or regulations concerning the safe operation of trains by any of the officials of the Polson Logging Co.?

A. No sir.

Mr. Walker: That is all.

Cross Examination

Q. (By Mr. Maxwell) Do you know a Mr. Gros-
close? A. Yes.

Q. (By Mr. Maxwell, continuing) Do you run
in and out of railroad camp?

A. Yes, we do now.

Q. I beg your pardon? [177] A. Yes.

Q. Did Mr. Gros- close ever warn you about
safety regulations? A. No.

Q. Were there certain safety standards to be ob-
served in the operation of the train?

The Witness: Well, I really don't understand
the question.

(Testimony of John Wicklund.)

Q. (By Mr. Maxwell, continuing) What part of the question [178] don't you understand?

A. Just what do you mean, the State or the Polson safety rules?

Q. Well, let us take the State.

A. Well, there are none of them posted.

Q. And when you referred to State regulations, what regulations did you have in mind? The logging safety standards put out by the Department of Labor and Industries of the State of Washington?

A. Yes.

Q. Do you have a copy of those standards?

A. I did have, yes.

Q. I beg your pardon?

A. I did have them.

Q. Showing you what has been marked for identification as Board's Exhibit No. 1,—

Mr. Walker: Respondent's Exhibit No. 1.

Q. (By Mr. Maxwell, continuing) Showing you what has been marked for identification Respondent's Exhibit No. 1, is that what you referred to?

A. Yes, I have had them.

Q. And when did you get those?

A. I presume at the Polson Logging Co., right in the office.

Q. In the office of the Polson Logging Co.?

A. Yes. [179]

Q. Which office of the Polson Logging Co.?

A. Railroad camp.

Q. Railroad camp? A. That is right.

(Testimony of John Wicklund.)

Q. Who gave them to you?

A. That I don't remember; I probably picked them up at the desk.

Q. Did you read those safety standards?

A. Yes.

Q. Were you instructed to read the safety standards? A. No.

Q. Were those safety standards to be observed?

A. Yes.

Q. I beg your pardon? A. I have.

Q. In addition to the safety standards put out by the State Department of Labor and Industries under the statutes of the State of Washington, the Polson Logging Co. had certain other safety measures that they required to be observed?

A. Not as I have seen.

Q. I beg your pardon?

A. I have not seen any.

Q. Have you ever heard of any? A. No.

Q. How long have you been pulling a train as an engineer? [180]

A. For Polson Logging Co.?

Q. Yes. A. Well, about 2½ years.

Q. Have you crossed the Axford Prairie crossing? A. Yes.

Q. Have you crossed that pushing the crummy ahead of the engine? A. At times.

Q. Does the trainman flag that crossing?

A. No sir.

Q. Do you watch them for a signal from them?

(Testimony of John Wicklund.)

A. You watch for the brakeman and the highway, both.

Q. Yes. You watch the brakeman for a signal? You watch for a signal from the brakeman?

Mr. Walker: He didn't say that.

Q. (By Mr. Maxwell, continued) I am asking you.

Mr. Walker: He didn't say that.

Mr. Maxwell: I object to the interruptions. He may redirect when he comes around to it.

Mr. Walker: If you are asking him, that is all right.

Mr. Maxwell: I object to the interruption of counsel on the ground that his objection is to inform the witness of the proper answer that he wishes him to give.

Trial Examiner Kent: It might be a better policy to just state your objections, and then take the matter up on [181] redirect examination.

Mr. Walker: Well, I object on the ground that he is misquoting the witness.

Trial Examiner Kent: Will you read the prior questions and answers, Mr. Reporter, and the pending question?

(Thereupon the questions and answers referred to were read aloud by the reporter as above recorded.)

Q. (By Mr. Maxwell, continuing) You watch for a signal?

(Testimony of John Wicklund.)

A. You watch for a signal from the trainman, and you also watch the highway.

Q. That is true, is it not, of Axford crossing?
Crossing No. 1? A. Yes.

Q. That is also true of crossing No. 3?

A. Yes.

Q. That is true of crossing No. 5?

A. Yes.

Q. That is true where the train is operating over those crossings in the daytime? A. Yes.

Q. Do you know Mr. Bennett Ellingson?

A. Yes.

Q. Did you ever see Mr. Bennett Ellingson at any of the crossings when the train was pulling cars?
A. When I was at the crossings?

Q. I mean, the main highway crossings of the railroad, Nos. [182] 1, 3 and 5?

A. Not as I recollect.

Q. Did Mr. Bennett Ellingson ever instruct you to approach the state highway and railway crossings with the train under control?

A. None other than to be sure to sound the whistle when the train comes to the crossing.

Q. Did he say anything about having the train under control? A. No.

Q. Did Mr. Groschlose ever tell you that?

A. No. [183]

Redirect Examination

Q. (By Mr. Walker:) Mr. Wicklund, you are an engineer? A. Yes.

(Testimony of John Wicklund.)

Q. And when you are an engineer and you are approaching Crossing No. 1, you are watching the highway and the brakeman, both; is that correct?

A. Yes.

Q. Now, as you are approaching Crossing No. 1 and you see some traffic on the highway, and it appears, from your judgment, that an emergency is liable to arise, what do you do?

A. I would stop.

Q. Would you do that whether the brakeman gives you a signal or not? A. Yes. [184]

Q. (By Mr. Walker:) When did you get your copy of that? A. When?

Q. Yes. A. I don't recall exactly.

Q. Was it before or after Mr. Reece or Mr. Lytle were discharged? A. Before.

Q. How long before? A. I could not say.

Q. Did anyone connected with the company give the book to you? A. No. [185]

Q. Did anybody connected with the company ask you if you had a copy of it? A. No.

Q. Did anybody connected with the company ask you if you had ever studied it, or if you had ever studied such a book of rules?

A. No, sir; not that I recall.

Recross-Examination

Q. (By Mr. Maxwell:) Mr. Wicklund, if you were approaching a crossing and you did not perceive immediate danger at the crossing, would you

(Testimony of John Wicklund.)

watch for a signal from the brakeman to see if he had perceived any danger?

A. You naturally watch both.

Q. You do not depend upon your own perception of danger or immediate threat of danger at a crossing?

Mr. Walker: I will object to that.

Trial Examiner Kent: Reframe the question. [186]

Q. (By Mr. Maxwell:) You depend, also, upon the brakeman to watch for danger at a crossing?

Mr. Walker: I will object to that as repetitious.

Trial Examiner Kent: The answer may be taken.

A. To a certain extent.

Mr. Maxwell: That is all.

Redirect Examination

Q. (By Mr. Walker:) Who has charge of the movement of the train when you are engineer?

A. I do.

Q. (By Mr. Stevens:) Assuming you are approaching a crossing in daylight, west-bound, and that you are engineer, with the engine backing up, and you have the crummy car ahead of you, and no brakeman is in sight; would you proceed or stop, or would you depend on your own vision? What would you do?

Mr. Maxwell: I will object to that on the ground that it is not proper redirect.

Mr. Stevens: You opened it up.

(Testimony of John Wicklund.)

Trial Examiner Kent: The answer may be taken.

Mr. Stevens: Will you read the question, please? [187]

A. I would depend on my own judgment.

Mr. Stevens: That is all.

Recross-Examination

Q. (By Mr. Maxwell:) What do you mean by that? A. What do I mean?

Mr. Maxwell: Will you read the last question that Mr. Walker asked, Mr. Reporter?

(Thereupon, the question referred to was read aloud by the reporter as follows:)

“Question: Who has charge of the movement of the train when you are engineer?”

“Answer: I do.”

Q. (By Mr. Maxwell:) What do you mean by that?

A. The man at the throttle controls the train while it is in motion.

Q. You mean, if you were the engineer, you would have the power to start and stop the train?

A. Yes.

Q. Isn't it true that the head brakeman is in charge of the train, and that he secures the orders and passes them on to you?

A. That is true, yes.

Q. And you would not move the train in any direction without [188] receiving the orders from the head brakeman or the other brakeman?

A. If you were in motion?

(Testimony of John Wicklund.)

Q. If you were stopped, you would not proceed without having orders from the brakeman?

A. No.

Q. As you approach a junction point, who secures the orders for the further movement of the train to the next junction point?

A. The brakeman.

Q. And he passes those along to you?

A. That is right.

T. C. CORRIGAN

was called as a witness by and on behalf of the Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Walker:) What is your name?

A. T. C. Corrigan.

Q. How do you spell your name?

A. Corrigan (spelling). [189]

Q. Where do you live, Mr. Corrigan?

A. Polson Railroad Camp.

Q. What is your occupation?

A. Locomotive engineer.

Q. Are you employed at the Polson Logging operation? A. Yes, sir; I am.

Q. How long have you been employed there?

A. Since the day after Labor Day, 1934.

(Testimony of T. C. Corrigan.)

Q. During all of that time, what has been your employment with the Polson Logging Company?

A. Locomotive fireman and engineer.

Q. Did you work for the Polson Logging Company on May 21, 1940? A. Yes.

Q. And what time did you begin work on that day? A. I am not sure.

Q. When you did begin work that day, what was the first thing you did?

A. I went out in the yard and got a string of empties, I believe.

Q. And where were the empties on the train?

A. Behind; we were pulling them.

Q. How many empties did you have?

A. I believe around twenty.

Q. What type of cars were they?

A. Low trucks. [190]

Q. Now, when you say you were pulling those cars, in which direction was the engine facing?

A. The engine was backing up.

Q. Was there anything immediately ahead of the back end of the engine? A. Yes.

Q. What? A. The crummy.

Q. What engine did you have on May 21, 1940?

A. No. 18,—locomotive No. 18.

Q. And what tender did you have attached to No. 18?

A. The tender that is now on 101.

Q. After making up your train from the railroad yards, what did you do?

(Testimony of T. C. Corrigan.)

A. I suppose we stopped at the railroad camp, and then we continued toward Camp No. 4 junction. [191]

Q. (By Mr. Walker:) Was it daylight when you left the yards? A. Yes, it was.

Q. After leaving the yards on your way toward Camp No. 2, did you come to a highway crossing?

A. Yes.

Q. What is the first one you come to?

A. Crossing No. 1.

Q. (By Mr. Walker:) Well, what is there this side of the Axford Prairie Crossing?

A. A service station and a store.

Q. Now, at the time the train had reached to a point about opposite the service station and the store, how fast was the train traveling; approximately? [192] A. Approximately ten miles an hour.

Q. After proceeding westward to a point opposite the service station, what is the next thing you did?

A. I blew the whistle before I got to the service station, continuously to the crossing.

Q. As you approached the crossing, what else did you do besides blowing the whistle?

A. The train was decreasing speed to a certain point.

Q. How was the visibility at the crossing?

A. Good visibility.

Mr. Maxwell: I move that the answer be

(Testimony of T. C. Corrigan.)

stricken. I move [193] that both the question and answer be stricken.

Trial Examiner Kent: Read the question, and also read the answer.

(Thereupon, the last question and answer were read aloud by the reporter as above recorded.)

Trial Examiner Kent: The record may remain.

Q. (By Mr. Walker:) That morning, as you approached the crossing, where were you looking?

Mr. Maxwell: I will object to this upon the same grounds, Mr. Examiner; and, in order to save time, I would like to have it understood that my objection,—

Trial Examiner Kent: (Interposing) Goes to the entire line.

Mr. Maxwell: (Interposing) Goes to this line of questions, and all similar questions.

Trial Examiner Kent: Reframe the question.

Q. (By Mr. Walker:) As an engineer going west out of Railroad Camp, which side of the cab were you on?

Mr. Maxwell: May I interject: Is it understood that my objection goes to all the questions?

Trial Examiner Kent: Yes. The objection may go to the line.

The Witness: Shall I answer?

Trial Examiner Kent: Yes, you may answer.

Q. (By Mr. Walker:) On what side? [194]

A. On the left side.

(Testimony of T. C. Corrigan.)

Q. On the left side of the train?

A. That is right.

Q. In that position, where is the left side of the train with respect to the tracks? Where is the highway with respect to the track?

A. The engineer is next to the highway.

Q. And how close is the highway to the track, approximately?

A. Some fifty feet.

Q. The track, as it approaches Axford Crossing, —Strike that. The train, as it approaches the Axford Crossing is going in a westerly direction; is that correct?

A. Yes.

Q. And in which direction is the highway running along that point prior to where the highway crosses the railroad track and forms crossing No. 1?

A. It is parallel to the track.

Q. For about how long a distance is the highway parallel?

A. On the left-hand side, some three miles, I would say.

Q. Now, as the highway hove into sight that morning, where was your attention directed?

A. At the highway and at the track, too.

Q. Did you observe anything on the highway?

A. Mr. Ellingson was the only one I could see.

Q. About how fast would you estimate Mr. Ellingson was traveling [195] at that time?

A. He traveled along side of the engine for possibly half a mile.

Q. And then what did he do?

(Testimony of T. C. Corrigan.)

A. He stopped at the crossing.

Q. Where was the train with respect to the crossing at the time Mr. Ellingson drew up and stopped at the crossing?

A. At the time he stopped, we were just starting across the highway.

Q. And where was Mr. Ellingson as you crossed the crossing?

A. He was in his car at the time.

Q. Now, was it sun light at the time you came into sight of the highway that morning?

A. I don't recall the sun; but it was good visibility.

Q. When you are sitting in the cab of engine No. 18, is your vision to the right obstructed by the No. 101 tender?

A. To a certain extent, yes.

Q. As you approach Axford Crossing,—Let us make it specific. As you approached Axford Crossing on May 21, did you look to the highway to the right?

A. Ordinarily I would look at the fireman to see that he was watching.

Q. Did you that morning?

A. I don't doubt that I did. It becomes habitual; I don't remember that morning specifically. [196]

Q. What was he doing? Do you know?

A. He was looking towards the highway.

Q. Approaching Axford Prairie Crossing, pulling approximately twenty empty cars, traveling

(Testimony of T. C. Corrigan.)

approximately ten miles an hour, if an emergency arose, how long would it take you to stop?

Mr. Maxwell: I will object to that on the ground that it is totally immaterial.

Trial Examiner Kent: The answer may be taken.

The Witness: Shall I answer?

Trial Examiner Kent: Yes, you may answer.

A. I would say probably 200 feet.

Q. (By Mr. Walker:) As an engineer, when you are observing both the highway and the track ahead, when you see an emergency arise, what do you do?

A. I use my best judgment under the circumstances.

Q. Have you ever been given any instructions from any of the supervisors of the Polson Logging Company concerning the safe operation of the railroad?

A. At one time I was told to blow more whistles; I believe that is all.

Q. And who told you that?

A. Mr. Ellingson.

Q. Has any of the supervisory officials or the management of the Polson Logging Company ever told you of any rules or regulations concerning safe operation of the train? [197]

Cross-Examination

Q. (By Mr. Maxwell): On the morning of May 21, 1940, approaching Axford Crossing, did you see Mr. Lytle or Mr. Reece out on the crummy?

(Testimony of T. C. Corrigan.)

A. No, sir.

Q. Were they inside? A. Yes, sir.

Q. Did you look for a signal from them?

A. They were not in sight; I was looking in that direction.

Q. Have you gone across there with other head brakeman besides Mr. Lytle? A. Yes.

Q. Prior to May, 1940? A. Yes.

Q. On occasions, when you crossed the crossing, prior to May, 1940, what other head brakemen were in charge of the train?

A. Red Williams, for one.

Q. Did Mr. Williams ride out on the crummy, inside? [198]

A. All head brakemen, I would say, are out there most of the time; I couldn't say that any of them are out there all the time.

Q. You mean when you say, "Most of the time," in crossing the highway crossing? A. Yes.

Mr. Maxwell: That is all. [199]

Q. (By Mr. Stevens): Will you describe this particular crossing when you are going west-bound, as to the engineer's visibility in each direction—the length that you could see in each direction?

A. From the engineer's side of the train, you can see almost an unlimited distance down the highway. From the fireman's side, the fireman can see, I would estimate, a quarter of a mile until you are, I would say, three hundred feet from the crossing. The engineer can see the traffic,—the engineer can see the

(Testimony of T. C. Corrigan.)

traffic, I believe, on that side of the track very good up until about three hundred feet of the track,—of the crossing.

Q. You mean the other side of the crossing when you are going west-bound,—you mean you can see the cars coming toward the crossing for three hundred feet?

A. No; you can't see the cars come except the last three hundred feet. The fireman, of course, could see that. For the engineer, it might be a blind spot or something like that.

Q. Let's, to clarify it,—I don't quite understand what you referred to when you spoke about the three hundred feet from the crossing. [200]

A. Well, I don't think I stated it clearly. I mean, when you get to where you are, I would say, three hundred feet from the crossing, the fireman can see for about a quarter of a mile. I will put it that way.

Trial Examiner Kent: By the way, as I recall your testimony, the highway runs in a generally parallel direction for some distance, parallel to the track? The Witness: Yes.

Trial Examiner Kent: What sort of a turn does it make at the crossing?

The Witness: Well, I would say about sixty degrees; possibly a little sharper than that.

Recross-Examination

Q. (By Mr. Maxwell): This highway runs in a westerly direction, parallel to the track? [201]

A. Yes.

(Testimony of T. C. Corrigan.)

Q. And then it turns in a northerly direction, does it not? A. Yes.

Q. And then right after the turn it crosses the track? A. Yes.

Q. And then on the north side of the track, the underbrush has been cut back for a distance; is that correct? A. Yes.

Q. At a point five hundred feet from the crossing down the track, how far did you say that you could see up the highway on the north side of the track?

A. For a quarter of a mile, did I say?

Q. That you could see up the highway a quarter of a mile, which roughly, is 1600 or 1700 feet?

A. That is my estimate, yes.

Redirect Examination

Q. (By Mr. Walker): Mr. Corrigan, are there any obstructions along the railroad right-of-way between the points where the highway hove into view and begins to parallel the railroad track to the point where the highway crosses over the railroad track?

A. There is one about half a mile from the crossing.

Q. And what is that?

A. There is a cut there.

Q. How long a cut is it? [202]

A. Several hundred feet there; you can't see the road.

Q. You can't see the road for several hundred feet? A. For several hundred feet.

Q. (By Mr. Walker): Was there any traffic on

(Testimony of T. C. Corrigan.)

the highway that morning, on either side of the crossing, other than Mr. Ellingson?

A. There was no traffic. [203]

Mr. Walker: Mr. Pauly.

PAUL PAULY

was called as a witness by and on behalf of the Board, having been first duly sworn, was examined and testified as follows:

Q. (By Mr. Walker): Will you state your name?

A. Paul Pauly.

Q. Where do you live, Mr. Pauly?

A. Aberdeen.

Q. Aberdeen, Washington? A. Yes, sir.

Q. What is your occupation? A. Brakeman.

Q. Are you employed by the Polson Logging Company? A. Yes.

Q. How long have you been employed by them?

A. About two and one-half years.

Q. During that time, what has been your work?

A. Head brakeman.

Q. Do you know a man by the name of Bennett Ellingson? A. Yes.

Q. In April or May, 1940, were you head brakeman? A. Yes.

Q. Are you a member of any labor organization?
[204]

A. I am.

(Testimony of Paul Pauly.)

Q. What organization?

A. The Trainmen; the Brotherhood of Railroad Trainmen.

Q. Have you ever had a conversation with Mr. Ellingson concerning the Brotherhood?

A. Well, a short one, I guess.

Mr. Maxwell: Speak up so I can hear you.

The Witness: A short one.

Q. (By Mr. Walker): Where did that take place?

A. In the office at the railroad camp; the bank office, I guess.

Q. And what was said?

A. Well, he asked me what I thought of the Brotherhood, and I said that his guess was as good as mine about that. That is about all that was said about it.

Q. Have you related all that you can recall that was said at that time? [205]

Q. (By Mr. Walker): At this conversation at the railroad office, Mr. Pauly, did Mr. Ellingson also ask you how the Brotherhood organizing was progressing?

A. I don't exactly recall myself, whether there was any more than what I have already said about that. [206]

Q. (By Mr. Walker): How did this conversation come up? A. I don't exactly know.

Q. About what time of day was it?

A. I think I just got through work, and I came

(Testimony of Paul Pauly.)

in, and we got to talking about changing jobs; he spoke to me about going on a different engine the next day. That is about all I can recall.

Q. Now, when you arrived at the railroad camp from your home in Aberdeen, did you wear the same clothes on the job?

A. Sometimes I do, and sometimes I don't; it depends on the weather.

Q. Where do you change your clothes when you do?

A. Well, we have a kind of an ante-room by the office there; sometimes that is it. That is where we change our clothes, mostly.

Q. Where, with respect to the office, did this conversation take place?

A. Right off the office there, in this little room.

Q. Now, what were you doing at the time?

A. I was changing clothes, I think, at the time.

[207]

Q. And Mr. Ellingson came up and started to talk about giving you another train? A. Yes.

[208]

Q. Have you related all that was said between you and Mr. Ellingson in the change house?

A. I think I have.

Q. Now, does it refresh your memory that Mr. Ellingson asked you how the Brotherhood organizing was progressing, during the course of that conversation? [211]

A. No, it does not, really. He might have said

(Testimony of Paul Pauly.)

that, but I can't remember it. About the only thing I can remember is what I said about it.

Q. (By Mr. Walker): Has Mr. Ellingson, Mr. F. A. Polson, or Mr. A. M. Polson told you of any rules or regulations concerning safe operation of their trains?

A. Well, once.

Q. When was that?

A. To be sure to ride all cars that were pushed across the crossing. [212]

Q. And when was that?

A. I think about last April.

Q. Was it before or after Mr. Lytle and Mr. Reece were discharged? A. After.

Mr. Walker: That is all.

Cross-Examination

Q. (By Mr. Maxwell): Do you know Mr. Gros-
close?

A. Yes, I do.

Q. Prior to May 21, 1940, did he ever instruct you about riding the crummy car, in plain sight of the engineer when it was pushed across the crossing?

A. Not that I recall.

Q. Now, this accident that you referred to,—it wasn't an accident? This incident that you referred to where Mr. Bennett Ellingson or Mr. A. M. Polson, and Mr. F. A. Polson told you to be sure to ride the cars that you were pushing across the crossings,—what fixed in your mind that it was after the discharge of Mr. Lytle and Mr. Reece?

(Testimony of Paul Pauly.)

A. Well, the way the conversation come up.

Q. How is that?

A. Well, the way the conversation come up, I know it happened only a few months ago.

Q. Were you running into Railroad Camp in May, 1940?

A. Well, I was working there, but I don't recall what run I was [213] on.

Q. Do you recall Mr. Bennett Ellingson and Mr. Grosclose interrogating the head brakeman about the rule?

A. What rule?

Q. About the rule in regard to flagging highway crossings? Did they interrogate you?

A. No, sir.

Q. Did you start in with the company as a head brakeman?

A. Yes, sir.

Q. When you started in, were you instructed as to the operations of the trains by the superintendent or the train master?

A. Well, not very much that I can recall. I don't believe there was anything definite said that I can remember.

Q. Had you worked on the railroad there before?

A. Not at Polson's.

Q. Not at Polson's?

A. No.

Q. Did they give you any instructions as to the system of orders used by the company?

A. A telephone dispatching system that I was familiar with before I went there.

Q. Did they give you any instructions as to safety measures?

A. No.

(Testimony of Paul Pauly.)

Q. Have you flagged the crossings when the engine was pushing [214] the crummy or cars ahead of it? A. I have.

Q. You have been out on the crummy, in sight of the engineer? A. Yes.

Q. Were you instructed to do that?

A. No, sir.

Q. What led you to do it?

A. I think I am familiar with trains and feel I know what I ought to do.

Q. I beg your pardon?

A. I think I am familiar with trains, and therefore I felt that it should be done.

Q. Are you familiar with the loggers' safety standards issued by the Department of Labor & Industries of the State of Washington?

A. I don't think I ever read this one (indicating booklet).

Q. Have you ever read similar standards?

A. Well, there is an older one that I think I have read.

Q. The 1936 edition?

A. I don't think I have ever seen this one here (indicating).

Mr. Maxwell: That is all.

Redirect Examination [215]

Q. (By Mr. Walker): Where did you get the old one that you mentioned?

A. I think at Green River.

Q. Not at Polson's? A. Not that I recall.

(Testimony of Paul Pauly.)

Q. You have never seen one since you have been at Polson's? A. Not that I recall.

Q. Mr. Pauly, these times when you have ridden out, in sight of the train crew, was that when you were pushing more cars than the crummy ahead?

A. Well, at all times whether it was more or not.

SAM KEY

was called as a witness by and behalf of the Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Walker:

Q. Will you state your name?

A. Sam Key.

Q. Where do you live? [216]

A. At Polson's Railroad Camp.

Q. And what is your occupation?

A. I run a locomotive for the Polson Logging Company.

Q. How long have you done that?

A. I think I have been running for about six years up there.

Q. Are you a member of any labor organization? A. Yes.

Q. What organization?

A. I belong to the Brotherhood of Locomotive Firemen and Engineers. [217]

(Testimony of Sam Key.)

Q. (By Mr. Walker): I hand you what is marked as Board's Exhibit No. 4 and ask you if your signature appears on that there?

A. Yes, that is my signature; I signed for the Brotherhood of Locomotive Firemen and Engineers.

Q. Was that letter ever delivered to the Polson Logging Company?

A. That letter, or one similar to it; I think we signed three copies; that was taken by Mr. Lytle and delivered to Mr. Polson.

Q. Which Mr. Polson?

A. Mr. A. M. Polson.

Q. About when was that?

A. I think it was in May, 1940.

Q. Was anybody else with you?

A. I think Mr. Lytle, Mr. Brant, Mr. Reece, Mr. Williams, and myself.

Q. Who did the committee meet with?

A. They met with Mr. Arnold Polson, Mr. Alec Polson, and Mr. Bennett Ellingson.

Q. About what time of day did that meeting take place?

A. In the forenoon, about eleven o'clock, I would say.

Q. Could you state where the meeting was held? [218]

A. It was held in Mr. Polson's office in Hoquiam.

Q. And what occurred at that meeting?

A. Well, we met with Mr. Polson, and Mr. Lytle

(Testimony of Sam Key.)

gave him the agreement that we wanted signed, or wanted to negotiate, and he took the agreement and looked at it, and we talked awhile. Do you want me to go into detail?

Q. Before taking membership in the Railroad Brotherhood, had you ever held membership in any other labor organization?

A. Yes. I belonged to the Sawmill & Timber Workers, A. F. of L., and the C. I. O.

Q. All right. Will you go ahead and state in your own words everything that was said by the different parties at that meeting?

A. Well, at the meeting there we asked Mr. Polson to negotiate with us and, as I recall, I think he informed us that we were under some kind of a contract with the C. I. O.; and he also told us that he thought we would be better off if we stayed in one union. This has been quite awhile ago. And he reminded us that another fellow, Mr. Brant and myself, had been on the shop committee of the C. I. O.,—which we had,—and he said, “If I remember right, I think you are on that committee.” We had. And then he said he didn’t see any [219] reason why we should leave the C. I. O.; and as we were leaving, he advised us to think the matter over.

Q. What do you mean? He told you to think the matter over? A. Yes.

Q. (By Mr. Walker): As you were leaving, did Mr. Polson say anything to you?

(Testimony of Sam Key.)

A. If I remember correctly, those were the exact words, "You boys think it over." I believe those were his exact words.

Q. During all of the time you worked for the Polson Logging Company, has Mr. A. M. Polson, Mr. F. A. Polson, or Bennett Ellingson told you about any rules or regulations concerning safe operations of trains?

A. He has told us where and when he wanted his signals, and the speed of the trains on the hills, and speed through camp and over crossings.

Q. What signals do you mean?

A. What do you mean? Whistle signals?

Q. Did he give you any specific instructions?

Mr. Maxwell: Who?

Q. (By Mr. Walker): Who gave you these instructions? A. Mr. Ellingson. [220]

Q. Did Mr. Ellingson tell you anything about crossings other than what speed he wanted you to cross at? Other than what speed he wanted the train to move at while crossing the crossings?

A. Except that he wanted lots of whistles at crossings.

Q. Were there any safe operation rules and regulations of any kind told to you by Mr. Ellingson, or by any of those present, other than the ones you have mentioned? A. I don't recall.

Mr. Walker: That is all.

(Testimony of Sam Key.)

Cross Examination

By Mr. Maxwell:

Q. Were you informed of these safety rules prior to May, 1940?

A. For the whistles, I think he told me when I started to run, or shortly afterwards.

Q. What about the speed over crossings?

A. Well, I don't remember just when he told me that.

Q. Do you recall whether or not it was before May, 1940?

A. No, I do not; but the speed has always been about the same; we have observed that rule.

Q. You have observed that rule?

A. Yes, in moving over crossings.

Q. You are the engineer? A. Yes.

Q. You have crossed Crossing No. 1 as the head brakeman or the [221] second brakeman?

A. I am not a trainman.

Q. That is right. You are the engineer?

A. Yes.

Q. When you have crossed crossing No. 1, has the head brakeman or the second brakeman ridden on the crummy?

A. Yes, they are usually on the crummy, or on the outside or inside, by the little window.

Q. In approaching the crossings, are they in sight of the engineer?

A. Mostly. Sometimes they are and sometimes they are not. I can't always tell, and I couldn't

(Testimony of Sam Key.)

tell their position without leaning out of the window, and then you would be too far away from the controls. [222]

Q. (By Mr. Maxwell): Have the head brakemen on the trains on which you have acted as engineer flagged Crossing No. 1?

A. No. As a rule they stand out there; some do, when you are over the crossing, and they give you a high ball. Q. Stand where?

A. Usually on the crummy, or sticking their heads out of the door, inside.

Q. In sight of the engineer?

A. No, not always.

Q. And they give a signal for the engineer?

A. Some do, and some don't; it is up to the brakemen.

Mr. Maxwell: That is all.

Redirect Examination

By Mr. Walker:

Q. Do you recall whether or not this matter about the slow speed over crossings occurred before or after Mr. Reece and Mr. Lytle were discharged?

A. There was instructions after; I don't remember whether there was any prior instructions to that, but instructions were given afterwards.

Q. When you say some brakemen stick their heads out of the window, what do you mean?

A. Well, the crummies are not all alike.

(Testimony of Sam Key.)

Q. They are, inside? [223]

A. Most of the crummies now. On most of the crummies now you can stay inside and see out. They have big windows and side doors. [224]

Mr. Walker: Mr. Harlan.

JOHN HARLAN

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Walker:

Q. Your name is John Harlan? A. Yes.

Q. Where do you live? A. In Hoquiam.

Q. Where are you employed?

A. At the Polson Logging Co.

Q. And in what capacity?

A. Locomotive fireman at the present time.

Q. How long have you been employed at the Polson Logging Co., on their railway system?

A. Well, this last time,—it was four years the 4th of last March,—I have worked off and on a number of years.

Q. Do you know Bennett Ellingson?

A. Yes.

Q. Were you working at the Polson operations in April 1940? A. Yes.

Q. In April 1940, where were you running?

(Testimony of John Harlan.)

A. I think it was on the lower end dumping logs, and possibly making a trip west at the same time. It is hard to say. The engine I am on is shifted around quite a bit.

Q. What camp were you operating out of? [225]

A. Railroad Camp.

Q. Are you a member of any labor organization? A. Yes.

Q. What organization?

A. The Brotherhood of Locomotive Firemen and Enginemen.

Q. On or about April 1940 did you have a talk with Mr. Ellingson about the Brotherhood?

Mr. Maxwell: I didn't hear the answer.

Mr. Walker: He did not answer yet.

The Witness: There was nothing said about the Brotherhood.

Q. (By Mr. Walker, continuing): What was it that was said?

A. Mr. Ellingson stopped me as I was going in, and he said that he thought that C. B. Groves was leading us astray.

Q. (By Mr. Walker, continuing): Did you know Mr. Groves in April 1940? A. Yes.

Q. Was he employed out there? [226]

A. Yes, he was employed there.

Q. Where was he employed?

A. As a brakeman for the Polson Logging Co., or Ozette.

Q. Mr. Harlan, about when did you become a member of the Brotherhood?

(Testimony of John Harlan.)

The Witness: I am not sure.

Q. (By Mr. Walker, continuing): Approximately?

A. Oh, I put in an application some time in March.

Q. What year? A. 1940, I believe.

Q. And before you became a member, did anybody talk to you about the Brotherhood?

The Witness: Yes, I was talking to,—I talked to Mr. Lytle.

Q. (By Mr. Walker, continuing): Anybody else? A. I don't recall anybody else.

Q. And before you sent an application in to the Brotherhood, were you a member of any labor organization? A. The Timber Workers.

Q. The I. W. A.?

A. The I. W. A. I think it was. [227]

Q. Now, did you have a talk with Mr. Ellingson again after that conversation which you have just now related?

A. I don't think we ever talked to Mr. Ellingson.

Mr. Maxwell: I didn't hear the answer.

The Witness: I say, I don't think I ever talked to Mr. Ellingson; I know, not about the Brotherhood. Mr. Ellingson made a statement one time that the Northern Pacific was going to take it over. It was a statement made on the engine.

Q. (By Mr. Walker, continuing): About when did you have this talk about the Northern Pacific,

(Testimony of John Harlan.)

with respect to the time when he talked to you about Mr. Groves?

A. It was possibly in April, I expect. I don't know when it was; shortly after that; a few days after that; a few days one way or the other; I wouldn't say for sure.

Q. Now, has Mr. F. A. Polson or Mr. A. M. Polson or Mr. Ellingson told you about any safety rules or regulations concerning the safe operations of the railroad?

A. No, I have not received any. For the short time I have [228] been up here, they told me about the whistles, and gave me the speed through camps and crossings. I ran up there about a week or two one time.

Q. Have you ever received or been told of any rules or regulations concerning the safe operations of trains by any of those three?

A. No, I have not.

Q. Other than the ones that you have just mentioned? A. No.

(Witness excused.)

Mr. Maxwell: While counsel is considering what to do, I move that the testimony of Mr. Harlan with respect to the effect that C. B. Groves was leading the boys astray, be stricken; I further move that the answer in which Mr. Harlan said that Mr. Ellingson stated that the N. P. was going to take over the Polson line, be stricken.

Mr. Walker: May I be heard on that, Mr. Examiner?

Trial Examiner Kent: Yes.

Mr. Maxwell: For the reason that it is irrelevant, incompetent and immaterial.

Trial Examiner Kent: Your objection is noted. [229]

Trial Examiner Kent: Is Mr. Groves an officer of the union?

Mr. Stevens: I didn't hear the question.

Mr. Walker: Is Mr. Groves an officer of the Brotherhood? [230]

Mr. Stevens: No.

Mr. Maxwell: Mr. Examiner, the record will speak for itself, of course. Counsel misquoted the testimony of Mr. Wood regarding the alleged conversation. Counsel stated that Mr. Ellingson said the company was not going to stand for two unions. There is no such testimony at all; there isn't even an inference.

Trial Examiner Kent: I will reserve my ruling on motion to strike Mr. Groves' testimony concerning the alleged Lehman remarks, pending consideration of the entire record. In view of counsel's statement, I will reserve ruling on this motion and consider the testimony in the transcript. Some of it, I am a little hazy about. I prefer to consider the record as a whole. So I will reserve ruling on this motion, also.

NELS HILL [231]

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Walker:

Q. Where are you employed?

A. At the Polson Logging Co. at Railroad Camp.

Mr. Stevens: I can't hear you.

Q. (By Mr. Walker, continuing) In what capacity are you employed there?

A. Well, I have been working at braking,—running on the train,—

Q. How long have you worked on the Polson railway system?

A. I don't hardly remember it; quite a while.

Q. Since 1912? A. Well,—

Q. Since 1912?

A. No; I have not worked on the road since 1912.

I was there in 1912. About 1915.

Q. In 1915 you started working on the railroad?

A. I think it was 1915.

Q. 1915? A. Along in there. [232]

Q. Did you work for the Polson Company, on the railway, in April and May of 1940?

A. Yes.

Q. And about that time, April or May, what were you doing? Do you recall?

A. I was braking.

Q. In April or May of 1940, did you know Bennett Ellingson? A. Yes.

(Testimony of Nels Hill.)

Q. At that time did you also know a Mr. Landi?

A. Yes.

Q. And what was Mr. Landi's job?

A. Section-man.

Q. Are you a member of the Brotherhood?

A. Yes. [233]

Q. (By Mr. Walker): Mr. Hill, were you present during a conversation between Mr. Ellingson and Mr. Landi in either April or May of 1940?

A. I think I heard them talking; Yes, I heard them talking.

Q. And where was that? A. On a flat-car.

Q. Who all were on this flat-car?

A. Well, there was three of them. Landi and Bennett and I was on there,—that is three. There were a couple more, but I can't remember who.

Q. And what was said at that time?

A. Well, they had a couple of wrecks down there.

Trial Examiner Kent: Talk a little louder, please.

The Witness: And he was talking about,—he thought they were bucking down there, that there were two unions in there, and they were bucking,—something like that, he mentioned. Then he said, "One of them fellows is down here now." He didn't say who it was, but I heard him.

Q. (By Mr. Walker): What had occurred just before this conversation arose?

A. They had a wreck up at Old Camp No. 6.

(Testimony of Nels Hill.)

Q. By Old No. 6?

A. Yes. And they were fixing the crackup; and they had [234] another wreck further down, too, and the section crew was working on it.

Q. There were two wrecks that day?

A. There were two wrecks. I was working on No. 18.

Q. And you were working on No. 18?

A. Yes.

Q. (By Mr. Walker): Well, let me ask you this; do you know C. B. Groves? A. Yes.

Q. And where was Mr. Groves at the time this conversation took place?

A. He was down in there below No. 6.

Q. (By Mr. Walker): Did you do logging before you went railroading? A. Yes.

Q. Do you know what the term "bucking" means? What does it mean?

A. It means bucking logs after they have been fallen; after [235] the fallers have fallen the tree, or cut the tree down, they have buckers.

Q. Were there any fallers or buckers around there, or around that wreck?

A. I didn't see any; there might have been.

Q. Did Mr. Ellingson say who was doing the bucking?

A. No, he didn't mention his name.

Q. Were there any buckers bucking logs at the wreck? A. No.

Q. (By Mr. Walker): How did the conversation come up?

(Testimony of Nels Hill.)

A. Well, it came up when they got in the car, and he was talking to Landi. [236]

Q. (By Mr. Walker): Was there a conversation between Mr. Ellingson and Mr. Landi?

A. Yes.

Q. Did Mr. Ellingson take part in it?

A. He was the one talking to Landi.

Q. And what did Mr. Ellingson say?

A. He said, "It looks like they are bucking." That is what he said. And then he said, "Some day somebody,—some day they will all be going down the road." That is what he said.

Trial Examiner Kent: If you can't remember all what Mr. Ellingson said, and what Mr. Landi said, just tell us what was said. Assuming, of course, Mr. Landi said anything.

The Witness: Mr. Landi didn't say anything.

Trial Examiner Kent: Talk louder.

The Witness: He was just listening. They was talking.

Q. (By Mr. Walker): When you use the word "they", who do you mean by "they"?

A. They were talking.

Q. Who was that?

A. Mr. Ellingson was talking to Mr. Landi.

[237]

Q. (By Mr. Walker): Are you repeating what Mr. Ellingson said, word for word, or are you giving the substance of it?

A. It is just the words that he said.

(Testimony of Nels Hill.)

Q. What?

A. It is just the words that he said.

Q. Did Mr. Ellingson say anything more after he said, "they are bucking"?

A. No; he didn't say anything more after that.

Q. What was Mr. Ellingson doing after they were talking?

A. Well, they were going back to the other wreck there.

Q. How was he acting?

A. He was acting all right.

Q. Does Mr. Ellingson swear?

A. I haven't heard him swear very often.

Q. Did he on that day?

A. No; I didn't hear it. [238]

Q. (By Mr. Walker): Did Mr. Ellingson say anything about Unions during that conversation?

A. No, he didn't mention Unions.

Q. (By Mr. Walker): Have you related all you can recall that was said during the course of that conversation?

A. Yes, I think so. [239]

Q. (By Mr. Walker): Did Mr. Ellingson say anything about one of the train men leading the men into the Brotherhood?

The Witness: He said there was one down there.

Trial Examiner Kent: That is all he said, that there was one down there? Is that all he said?

The Witness: Yes, that is all he said, "one of them down there."

Trial Examiner Kent: Just tell what you re-

(Testimony of Nels Hill.)

member hearing Mr. Ellingson say; give us all the words that he said.

The Witness: Well, he said when he got on,—when he got on, he started talking to Mr. Landi, and he said that it [240] looked like they are bucking. He says, “In this here Union,” he says,—and he says there is one of them down,—he says, “there is one of them down there now.” And then he said “It looks like he is leading the men astray.”

Trial Examiner Kent: Leading the men what?

The Witness: Astray. He said, “one of them is down here now.”

Trial Examiner Kent: Will you read that answer, Mr. Reporter?

(Thereupon the answer of the witness was read aloud by the reporter of the above recorded.)

The Witness: And then he said, “some of these days, I will let them all go.” That is just the words he said.

Q. (By Mr. Walker): Mr. Hill, what engine men and trainmen were down there?

A. I can't remember who it was.

Q. Who was on the train?

A. Bert Fenton was running the train.

Q. Mr. Fenton was the engineer. A. Yes.

Q. Who was his fireman?

A. I can't remember who it was.

Q. You were one of the brakemen?

A. Yes.

(Testimony of Nels Hill.)

Q. Who was the other one? [241]

A. I was alone.

Q. Who were the trainmen on the other train?

A. McCabe was, but I don't know who was firing for him.

Q. Who were the brakemen?

A. Joe,—I don't know what his last name is. I know his first name is Joe. I don't know exactly what his last name is,—Joe Martinez, I guess it is.

Q. He was the other brakeman?

A. I don't know.

Q. Do you know what the other train was?

A. No. 90.

Q. Do you know whether Mr. Groves worked on No. 90 that day? A. No.

Q. Do you know whether he did or did not?

A. He was working on No. 45 that day.

Q. Where was that? A. Out of No. 6.

Q. Near the wreck?

A. No; on the other side of it. [242]

Q. (By Mr. Walker): In which direction had Mr. Ellingson come when he came to the wreck?

A. Well, he came from out the line somewhere around the Railroad Camp; he was at the first wreck when I went down with the section crew.

Q. Were you between Camp 6 and Railroad Camp? A. Yes.

Q. And was No. 45 between Railroad Camp and Camp 6? A. It was on the other side of 6.

Q. (Mr. Walker): During the day,—during the

(Testimony of Nels Hill.)

time you have worked on the Polson Railway System, have either Mr. A. M. Polson, Mr. F. A. Polson, or Mr. Ellingson told you anything about any rules concerning the safe operation of the train?

A. Well, Bennett has spoke about it, yes; there were those new rules.

Q. Did you know of the discharge of Mr. Lytle or Mr. Reece? A. Yes.

Q. Was it before or after that?

A. It was after that, when he spoke to me. [243]

Q. (By Mr. Walker): Before Mr. Lytle and Mr. Reece were discharged, had Mr. A. M. Polson, or Mr. F. A. Polson, or Mr. Bennett Ellingson told you of any rules and regulations concerning the safe operation of trains? A. No.

Cross-Examination

By Mr. Maxwell:

Q. Were you ever told of any safety regulations regarding the operation of the train by Mr. Ellingson? A. Prior to May? [244]

Q. 1940. A. No, I have not.

Q. You have worked as a second brakeman, have you not? A. Yes.

Q. Were you told of any regulations regarding the safety of trains by the head brakeman?

Trial Examiner Kent: Who is that? Mr. Groves?

Mr. Maxwell: No, his head brakeman.

A. No.

Q. (By Mr. Maxwell): Were you ever told of any safety regulations by Mr. Groseclose? [245]

(Testimony of Nels Hill.)

A. Well, when he gave me that book here the other day,—

Q. (By Mr. Maxwell): Prior to May, 1940, you had never been instructed by him regarding any safety rules? A. No.

Q. I beg your pardon? A. No.

Q. You were on a train, were you not?

A. Yes.

Q. In November of 1937, when J. Morley Stearns was involved in an accident?

A. Yes, I see that.

Q. (By Mr. Maxwell): At that time, following the wreck there was an investigation, was there not?

A. I don't know anything about that.

Q. Didn't you give some statement about that wreck?

A. That we were in the clear, you mean?

Q. Yes. A. Yes, we was. [246]

Trial Examiner Kent: What was the time?

Mr. Maxwell: November 15, 1937.

(Whereupon the document referred to was marked for identification as Respondent's Exhibit 2.)

Q. (By Mr. Maxwell): Showing you what has been marked as Respondent's Exhibit 2 for identification, I will ask if that is your signature (handing document to the witness)? A. Yes.

Q. Calling your attention to Respondent's Exhibit 2, again, I will ask you if you can identify what that is?

(Testimony of Nels Hill.)

Mr. Walker: May I ask that the witness be instructed to answer the question yes or no, and not volunteer any material facts?

Trial Examiner Kent: What is the pending question?

Mr. Maxwell: I asked him if he could identify it?

Trial Examiner Kent: Very well. You can answer that yes or no.

A. I can identify it, yes.

Q. (By Mr. Maxwell): You can? A. Yes.

Q. What is it?

Mr. Walker: To that I object as incompetent, irrelevant and immaterial.

Mr. Maxwell: I have not offered it yet. [247]

Mr. Walker: I am objecting to the question.

Trial Examiner Kent: The objection is sustained. You are using it to refresh his recollection. I don't know that any question has been asked concerning the contents; it may not be necessary.

Q. (By Mr. Maxwell): Calling your attention to what has been marked for identification as Respondent's Exhibit 2, as this statement says, that this train was stopped about seventy feet from the crossing, as a supply car was ahead of the engine, and it was necessary to flag the crossing. Do you find that statement there?

Mr. Walker: I will object to that as incompetent, irrelevant and immaterial.

Trial Examiner Kent: The objection is sus-

(Testimony of Nels Hill.)

tained. I think you can question him in reference to that matter involved there, and then in case he denies it, I think you can refresh his recollection. I don't think there is any necessity to do that yet.

Q. (By Mr. Maxwell): The train was stopped on that occasion about seventy feet from the crossing because there was a supply car ahead of the engine; is that correct?

Mr. Walker: I will object to his reading that.

Trial Examiner Kent: The objection is sustained. You can proceed with your inquiry, but I don't think you need to refresh his recollection; it has not been shown that it is necessary. [248]

Mr. Maxwell: This witness has testified, Mr. Examiner, that he has never had any instruction; that there has never been any rule wherein he has been informed regarding the stoppage of trains or regarding safety operations, or safe operation of the trains. Now, we have a signed statement, in affidavit form, by this witness in which he says, "This train was stopped about seventy feet from the crossing, as a supply car was ahead of the train, and it was necessary to flag the crossing."

I certainly have the right to introduce this to show that there was such a rule, and that he must have been informed of it because it is there in his affidavit.

Mr. Walker: Counsel is reading into this record something that does not appear.

There is no statement enclosed in that document

(Testimony of Nels Hill.)

from which he is reading which indicates there was a rule regarding flagging of crossings. He may have done it, according to his judgment. There is no showing in the document itself about any rule or regulation imposing that duty upon these trainmen.

Mr. Maxwell (Reading): "As it was necessary."

Trial Examiner Kent: I think you are at liberty to inquire as to the rule and so forth; and then, if that is material, you may offer it to refresh his recollection.

Mr. Maxwell: Well, he is not my witness, Mr. Examiner.

Trial Examiner Kent: Well, I think you still have the right to attack his credibility. [249]

Q. (By Mr. Maxwell): Was the crossing flagged on the occasion of November 15, 1937, at this crossing accident? A. No.

Q. It was not?

A. No. We did not flag the crossing. We flagged the engineer to stop.

Q. Why did you flag him to stop?

A. Well, we seen the truck coming.

Q. Handing you Respondent's Exhibit 2 for identification, I will you if this statement: "The train was stopped about seventy feet from the crossing, as a supply car was ahead of the engine, and it was necessary to flag the crossing" does not appear; is that not correct?

Mr. Walker: He means, does that statement appear in there? Is it correct that it appears in there?

(Testimony of Nels Hill.)

The Witness: Yes.

Trial Examiner Kent: Does that statement appear in the paper?

Mr. Walker: I will object to that on the ground that it is not the best evidence.

Trial Examiner Kent: The answer may be taken. Does the paper show that?

The Witness: Yes; the paper shows that, yes.

Q. (By Mr. Maxwell): Does that refresh your recollection that the flagging of the crossing was required? [250]

A. No; they never did flag the crossing; only, you had to watch out.

Q. You had to watch out? A. Yes.

Q. What do you mean?

A. To see whether it was clear when you went over.

Q. If there was something coming.

A. Well, if that were true, if they were going over, it was their hard luck; if they were ahead of us, and we could see it, we would flag on the car.

Q. You got out on the head end of the crummy?

A. Yes.

Q. Under whose instructions did you do that?

Mr. Walker: The same objection. It is assuming there was any instructions.

Q. (By Mr. Maxwell): Well, were you given any instructions to do that?

A. No.

Q. Will you explain your statement, or this part of it, "It was necessary to flag the crossing"?

(Testimony of Nels Hill.)

A. Well, it is a case like that.

Q. Were you the head brakeman on that occasion?
A. No, I was second.

Q. Where was Mr. Williams riding?

A. He was standing right alongside of me.

[251]

Q. Where were you? A. On the flat car.

Q. Ahead of the crummy? A. Yes.

Q. Why were you standing there?

A. We always stood out there; we always were out there at the crossing.

Q. You were always out there at the crossing?

A. Yes.

Q. Is that the reason you were out there on this occasion?

A. That is the reason we were out there.

Q. Had Mr. Williams ever told you to go out there to flag? A. No.

Q. Do you mean to say that you flagged these crossings without ever having been instructed to do so?

A. Yes. I never was instructed to do so.

Mr. Maxwell: The respondent offers at this time what has been marked as Respondent's Exhibit 2 for identification, for impeaching purposes, and to show prior inconsistent statements.

Mr. Walker: To which I object on the ground that it is incompetent, irrelevant, and immaterial.

Trial Examiner Kent: The objection is sus-

(Testimony of Nels Hill.)

tained. It may be offered and sent in as a part of the files, as a rejected exhibit. [252]

RESPONDENTS' EXHIBIT No. 2

(Rejected as Evidence.)

State of Washington,
County of Grays Harbor—ss.

Re: J. Morley Stearns, Deceased.

We, the undersigned, having been duly sworn on oath, depose and say: That we are employed on train crew as brakeman for Polson Logging Co., Hoquiam, Washington, working on locomotive #70. That on November 15, 1937, at about 12:30 P. M. while enroute to Lake Quinault from Polson Railroad Camp, travelling north, approached Crossing #5, three miles south of Neilton, Washington, on Olympic Highway. That this train was stopped about 70 feet from crossing, as a supply car was ahead of engine and it was necessary to flag this crossing. That upon nearing crossing, preparatory to flagging crossing, they observed a log-truck approaching crossing, at an estimated speed of 40 miles per hour, travelling southwards towards Hoquiam, Washington. States that they observed truck swerving when about five hundred feet from crossing, evidently when truck-driver attempted to apply brakes. That train came to a complete stop about 70 feet from crossing as crew was unable to determine whether or not this truck was going to stop. That truck driver evidently lost control of

(Testimony of Nels Hill.)

truck which ran off of road on wrong side, crashing into a tree about 50 or 60 feet from crossing. That the rest of train crew was then notified of accident and railroad camp was called for assistance. That upon examination of driver and truck, the driver appeared dead and the truck was badly wrecked, engine and cab being demolished, with driver on truck seat, badly cut about head. That a car approached and a lady who appeared to be a nurse, examined the deceased and advised that she believed him still living, therefore the deceased was placed in an automobile and started towards Hoquiam, Washington. That the identity of the deceased was not known to any of train crew at time of accident. That the logging train of Polson Logging Co. had not crossed this railroad crossing at time of accident, both brakemen being on flat-car, having clear visibility of road on both sides of crossing. That the above facts are true and correct to the best of my knowledge:

(Signed) W. J. WILLIAMS,

Hoquiam, Rte. No. 1.

(Signed) NELS HILL

Witness:

TOM WALKER

Redirect Examination

Q. (By Mr. Walker): Was Stearns killed at the Axford Prairie Crossing? A. No.

(Testimony of Nels Hill.)

Q. Did you continue to work for the Polson Logging Company after Stearns was killed at that crossing? A. Yes.

Mr. Walker: That is all.

Recross-Examination

Q. (By Mr. Maxwell): The train did not strike Mr. Stearns' automobile? A. No.

Q. Stearns' automobile did not strike the train, did it? A. No, it did not.

Mr. Maxwell: That is all.

Redirect Examination

Q. (By Mr. Walker): Did you continue to work for the Polson Logging Company after Stearns was killed at this crossing, whatever crossing it was? A. Yes, I did. [253]

Mr. Walker: Mr. Brant.

LAWRENCE BRANT,

was called as a witness by and on behalf of the Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Walker:

Q. Are you employed by the Polson Logging Company? A. I am.

Q. How long have you been employed by them?

A. Well, in train service about twelve years.

(Testimony of Lawrence Brant.)

Q. What job have you held in train service?

A. As a fireman and engineer.

Q. Have you been an engineer in train service for some time? A. Yes.

Q. For how long?

A. Approximately two years.

Q. During the time you have been in the Polson train service, has either Mr. A. M. Polson, F. A. Polson or Mr. Bennett Ellingson ever told you about any rules or regulations governing safe operation of trains? A. No. [254]

Q. (By Mr. Walker): Has Mr. Grosclose ever told you? A. No, sir. [255]

Q. (By Mr. Walker): During all of the time that you have worked as an engineer, when you are sitting in a cab, approaching a crossing, particularly Axford Prairie Crossing, what do you do?

Mr. Maxwell: I will object to that as incompetent, irrelevant, and immaterial. [258]

A. We usually reduce our speed, as a general practice.

Q. (By Mr. Walker): Do you do anything else besides reducing speed?

A. Yes; we are watching the road.

Mr. Maxwell: Mr. Examiner, may it be understood that my objection goes to the entire line?

Mr. Maxwell: At this time I move that the testimony of the witness Lawrence Brant be stricken in its entirety as being irrelevant to any issue herein involved.

(Testimony of Lawrence Brant.)

Trial Examiner Kent: The motion will be denied.

Q. (By Mr. Walker): Handing you what has been marked as Board's Exhibit 4, have you ever seen that before? [259]

A. Yes, I have.

Q. Are you a member of any labor organization? A. Yes.

Q. What organization?

A. Brotherhood of Locomotive Firemen & Enginemen.

Q. Have you ever held any official position with that organization? A. No, sir.

Q. Have you ever had occasion to meet with any of the representatives of the company concerning the Brotherhood of Locomotive Firemen & Enginemen? A. Yes. [260]

Redirect Examination

Q. (By Mr. Stevens): I will restate the question. At the time this letter and contract proposal was prepared, you, as a member of the general committee had some voice in preparing it; is that correct? A. Yes.

Q. Is it or is it not a fact that Mr. Lytle, Mr. Reece, Mr. Williams, Mr. Key, and yourself were the members of the committees that called on Mr. Polson that day? [264]

A. Yes, it might be; I wasn't sure of all the names.

(Testimony of Lawrence Brant.)

Q. (By Mr. Stevens): Were you a member of any labor organi- [265] zation before you joined the Brotherhood of Locomotive Firemen & Enginemen? A. Yes.

Q. Was that mentioned at this meeting with Mr. Polson? A. Yes.

Q. State as near as you can recall what was said and by whom?

A. Mr. Polson asked me if I had not served on committees of the C. I. O., and I stated, "Yes." He asked me what my reason was for leaving the organization; I told him that I like others, were not in line with the policy of the leaders of the C. I. O., or the policies that the leaders of the C. I. O. were putting out, and therefore we thought it to our benefit to drop out of the organization.

Q. And did Mr. Polson make any comment or statement?

A. In answer to my statement?

Q. Yes. A. No, he did not.

Q. What happened from then on? Was anything more said prior to the time the meeting broke up and you left the room?

A. Not that I recall.

Q. Did you about the time you were leaving hear Mr. Lytle make any statement to Mr. Polson?

A. Yes.

Q. Describe that, as near as you can recall.

(Testimony of Lawrence Brant.)

A. He asked Mr. Polson if he would look at this agreement and consider it.

Q. And what did Mr. Polson say?

A. He said "Yes," that he would.

Q. Did he say anything else?

A. Nothing that I can recall.

Q. Was that at the time you were leaving the room? A. Yes.

Q. And did you leave the room before Mr. Lytle did? A. I don't recall as to that.

Q. In this conversation with Mr. Polson, was anything said about a jurisdictional dispute between other organizations?

A. Yes, I believe there was.

Q. (By Mr. Stevens): And what did he say?

A. Well, as I recall, he said he would not like to see two [267] unions in his camp because there would be involved jurisdictional disputes. He cited an instance in Bremerton, I believe it was, where the caulkers would not work because there were other unions involved in that place. That is, there were different unions working in that place. [268]

Mr. Maxwell: At this time, the respondent offers what has been marked as Respondent's Exhibit 2 for identification. Yesterday, I believe, your ruling was that it would be rejected. I now offer Respondent's Exhibit 2 for identification for the rejected file.

Trial Examiner Kent: It may be so received.

Mr. Walker: Mr. Reece.

CLAYTON REECE

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Walker:

Q. What is your occupation?

A. Brakeman.

Q. Have you been employed by the Polson Logging Co.?

A. Yes, sir.

Q. When did your employment first begin there?

A. July, 1928.

Q. 1940, wasn't it? A. 1928. [272]

Q. You began there in July 1928?

A. Yes.

Q. What was your work at that time?

A. Brakeman.

Q. You have worked continuously since 1928 until May 21, 1940, for the Polson Logging Co.?

A. No.

Q. Following your employment in 1928, when did it cease? A. In July of 1930.

Q. What occurred at that time?

A. I had an accident and got hurt.

Q. Did you resume employment with the Polson Logging Co. later, or come back there?

A. Yes.

Q. When?

A. I came back in the fall of 1933.

Q. At what job? A. Brakeman.

Q. Then how long did you continue working after you returned in 1933?

(Testimony of Clayton Reece.)

A. I don't remember exactly, but approximately two months.

Q. Then what occurred? A. I quit.

Q. Following that incident, did you work for Polson again? A. Yes. [273]

Q. When next did you begin work there?

A. In May of 1939.

Q. Did you work continuously then, when work was available, until May 1940? A. Yes.

Q. As a brakeman? A. Yes.

Q. From May 1939 until May 1940, did you work with anyone at Polson? A. Yes.

Q. Who? A. Different ones.

Q. In what capacity did you work there during that period?

A. Well, I went there as a head brakeman, first, on a one-man job,—construction job, and later I went on a log haul up until about the 4th of July, I believe.

Q. (By Mr. Walker, continuing): 1939?

A. Yes.

Q. And from July 4, 1939, until May 21, 1940, what did you work at? [274]

A. As a second brakeman.

Q. And who was your head brakeman during that period, or was it one man all the time?

A. No.

Q. (By Mr. Walker, continuing): Mr. Reece, are you a member of any labor organization?

A. Yes.

Q. What organization?

(Testimony of Clayton Reece.)

A. Brotherhood of Railroad Trainmen.

Q. How long have you been a member of that organization?

A. I first joined them in 1910.

Q. What year? A. 1910.

Mr. Walker: Was your membership terminated at some time?

The Witness: It was terminated in 1915. [275]

Q. (By Mr. Walker, continuing): And in May, 1940, were you a member of any labor organization?

A. Yes.

Q. What?

A. Brotherhood of Railroad Trainmen.

Q. In May 1940 did you hold any official position with the brotherhood? A. Yes.

Q. What?

A. I was secretary of the General Committee.

Q. And when did you receive that position?

A. I believe it was some time in March.

Q. 1940? A. 1940.

Q. Now, in your official capacity, did you have occasion at any time to meet with any of the representatives of the Polson Logging Co.?

A. Yes.

Q. And when was that?

A. It was May 18, 1940.

Q. Was anyone with you? A. Yes.

Q. Who?

A. The members of the committee.

Q. And who did you meet with? [276]

(Testimony of Clayton Reece.)

A. I met with Mr. Arnold Polson, Mr. Bennett Ellingson and Mr. Alex Polson.

Q. Where did you meet?

A. In the Polson office building.

Q. About what time of day did that meeting take place? A. About 11 o'clock.

Q. In the forenoon?

A. In the forenoon.

Q. About how long did it last?

A. Approximately half an hour.

Q. I hand you what is marked Board's Exhibit 4 and ask you if you have ever seen that document before?

(Hands document to witness.)

A. Yes.

Q. And where did you last see that?

A. When we presented it to Mr. Polson.

Q. When was it presented to Mr. Polson?

A. May 18, 1940.

Q. When it was presented to Mr. Polson, did he do anything with it? A. He read it.

Q. Did he say anything? A. Yes.

Q. What did he say?

A. Do you want me to explain everything that he said? [277]

Q. Yes.

A. He asked us why we were pulling out of the I. W. A., and we told him that we was not satisfied with the representation that we were getting; and we told him that the Railroad Train-

(Testimony of Clayton Reece.)

men could do us more good, and he said he didn't see why one union in the camp couldn't do us more good than two unions, and he thought we were making a mistake by getting out; and he also advised us that he was not running a railroad, that he was running a logging camp, and that on account of their being two unions he was afraid there might be trouble amongst the men, that they might have a jurisdictional dispute or something, that he didn't want that. We told him that we didn't want it, and that he needn't to be afraid of the Brotherhood, that we would not cause no trouble. I believe that was all. But, on going out, we asked him if he would read it over and give us an answer on it, and think it over, and he said he would; and then he said for us to think over what he had told us.

Q. Now, did that end the meeting?

A. I believe that was all.

Q. Following the meeting of May 18, when next did you work? A. May 20.

Q. Did you work all that day of May 20?

A. Yes.

Q. At the conclusion of that day's work, what did you do? [278]

A. We came in and tied up.

Q. As usual? A. Yes.

Q. After tying up, what did you do?

A. We went to the office and looked at the board to see whether or not,—to see what the line-up was.

(Testimony of Clayton Reece.)

Q. And was there anything posted on the board that night? A. Yes.

Q. What was posted there?

A. Call time for the next morning.

Q. And what was the call time?

A. Five o'clock, I believe, a.m.

Q. Did you report the next morning?

A. Yes.

Q. And what did you do that morning?

A. We went down into the yards and took up our train.

Q. What was your train? Of what did it consist that morning?

A. It consisted of trucks.

Q. What kind of trucks?

A. Disconnected trucks, I would call them,—I don't know.

Q. After picking up your train, what did you do? A. We headed west.

Q. And did you work all that day?

A. Yes.

Q. And at the end of that day what did you do? [279] A. We came in as usual.

Q. And what was that?

A. We came in on that day,—on that day we had our crummy car behind the trains, and I cut it off at the office.

Q. What do you mean by "cut it off at the office"?

A. We were pulling the train,—

(Testimony of Clayton Reece.)

Q. Just tell us what you can by "cut it off at the office.?" A. I pulled the pin on it.

Q. Does that detach the crummy from the rest of the train? A. Yes.

Q. After pulling the pin on the crummy, what did you do?

A. I stopped it with the hand brake.

Q. Where was this?

A. In front of the office, to clear the oil spur; that is the last thing we did, to take oil; and the head brakeman would take the train into the yard, with the logs and come back with the engine.

Q. How is that?

A. Put the logs on the siding and come back with the engine.

Q. After that what did you do?

A. I went over to the office and looked at the board while he was coming back?

Q. While who was coming back?

A. Well, the brakeman was bringing the engine back.

Q. Was there anything on the board? [280]

A. Yes.

Q. What?

A. There was a cross mark on my name and Mr. Lytle's. [281]

Q. (By Mr. Walker): Did you see Mr. Gros- close that night? A. Yes.

Q. Now, when you saw the "X" after your name, what happened?

A. He told me that Mr. Bennett was up in the

(Testimony of Clayton Reece.)

air about something, and that we were off the board,—that we were marked off the board.

Q. Who was the “he” that said that?

A. Grosclose. [282]

Q. (By Mr. Walker): After Mr. Grosclose said that Bennett was up in the air about flagging the crossing, did you say anything?

A. No, I did not.

Q. Did you say anything about whether or not you had ever heard anything about flagging the crossing?

A. I told him I had never heard anything about flagging the crossing.

Q. After you said that, did Mr. Grosclose say anything?

A. He said that,—well, he said that he didn’t know anything about it, only he said, “Bennett was back here this morning before I had my shoes tied up, and walked up to the board and made two cross marks on it, over your name and Lytle’s.”

Q. Did he say anything more at that time?

A. Not at that time. [283]

Q. Did you say anything more? A. No.

Q. After that did you see or come in touch with Mr. Ellingson? A. No, I did not.

Q. Did you ever get in touch with Mr. Grosclose again? A. Yes.

Q. When?

A. I called him the next day, which was our regular day off. He told us when we left there that day,—he said, when we left there, “Tomorrow is

(Testimony of Clayton Reece.)

your day off, and you had better call me, anyway.”

So I called at the end of the next day.

Q. That would be which day?

A. That would be the 22d.

Q. All right.

A. And he said, “No, there is nothing doing.” And I called him again at the end of the third day,—that would be the 23d, and he said, “There is nothing doing, and won’t be the rest of this week.” So I told him I was going to Seattle, that I would call him,—that I would call him Sunday night and he said, “O. K.” And I went to Seattle, and on Sunday evening I called him again.

Mr. Maxwell: What day was this, if you have a calendar there?

The Witness: That would be the 26th,—May 26.

Q. (By Mr. Walker): And did you have a talk with him that day? [284]

A. No. He said there was nothing doing. I then told him that he knew my telephone number, and that they were in the habit of calling me as much as I called them, and that if he needed me to call me.

Q. (By Mr. Walker): What happened then?

A. I called at the Polson Logging Company office for Mr. Bennett.

Q. When was that?

A. That was the following week.

Q. And what week was that?

A. That would be the following week after May 26.

(Testimony of Clayton Reece.)

Q. You called at the office during that week?

A. During that week I called at the office twice and they couldn't tell me anything about where I could find him. And I finally went down and asked them my status with the company, and they handed me my separation slip.

Q. When was that?

A. I couldn't say just definitely. [285]

Q. Have you the separation report that was handed you? A. Yes.

Q. (By Mr. Walker): I hand you what has been marked Board's Exhibit 11 for identification and ask you what that is.

A. That is a separation slip.

Q. Where did you get it?

A. From the Polson office.

Q. When did you get it?

A. I couldn't say exactly when.

Q. I call your attention to the date opposite the entry indication "Date," and I will ask you if it was before or after the date appearing thereon?

A. It was after.

Q. And who delivered it to you?

A. It was one of the office girls. [286]

Q. (By Mr. Walker): Were there any other representatives of the Brotherhood with you at the meeting of May 18? [287] A. Yes.

Q. Who were they?

A. They were Mr. Lytle, Mr. Lawrence Brant, Mr. Red Williams, and Mr. Sam Key. I believe that is all.

(Testimony of Clayton Reece.)

Q. Who was the spokesman for the committee?

A. Mr. Lytle.

Cross-Examination

By Mr. Maxwell:

Q. On the morning of May 21, the train on which you worked was proceeding in a westerly direction; is that correct? A. Yes.

Q. The engine was backing up; is that correct?

A. That is right.

Q. And it was pushing, in back of it, as it proceeded westerly, headed easterly, the crummy car?

A. Yes, it was pushing what is known as the crummy car.

Q. And it was pulling behind it, that is, hooked onto the head end of the engine, which was backing up, some other cars? A. Yes.

Q. What kind of cars did you say those were?

A. They were trucks. [288]

Q. What kind of trucks?

A. Logging trucks.

Trial Examiner Kent: What are logging trucks? Are they flat cars?

The Witness: No.

Q. (By Mr. Maxwell): Disconnected trucks is what they are called? A. Yes.

Q. Are they equipped with air? A. No.

Q. As you approached Crossing No. 1, which has heretofore been referred to as Axford Prairie Crossing, where were you riding?

A. Riding on the crummy.

(Testimony of Clayton Reece.)

Q. Were you in the dog house on the crummy?

A. I was in the crummy; that would be the dog house.

Q. The dog house, as the term is used in your answer, means the structure that is built on one end of the crummy? A. Yes.

Q. The end next to the engine? A. Yes.

Q. And you remained in the dog house as the train approached and crossed over Axford Prairie Crossing? A. Yes.

Q. You testified to a conversation with Mr. Grosclose. [289] A. Yes.

Q. Was there anyone else present on May 21?

A. Yes, there were others.

Q. Who were the others?

A. Yes, there were others; I don't recall,—I don't just recall them now.

Q. Suppose you think for a moment. Can you recall that?

A. The timekeeper was in there for one.

Q. Who is that?

A. Jerry,—I can't recall his name.

Q. Is that the timekeeper at Railroad Camp?

A. Yes.

Q. How long had he been there?

A. How long had he been there?

Q. Yes.

A. He had been there all the time I was there.

Q. Would it refresh your recollection,—was Roth there? Was it Roth? A. Yes. [290]

(Testimony of Clayton Reece.)

Q. Anyone else present?

A. And there was a young fellow by the name of Klickman.

Q. Who?

A. I don't remember his first name. His last name is Klickman.

Q. Does he work for the company?

A. At that time?

Q. Yes. A. You mean at that time?

Q. Yes.

A. Yes, he was a kind of an all-around man, a stockman or something like that at the office.

Q. Who else was present?

A. I don't recall anyone else.

Trial Examiner Kent: I am going to ask one question. Had you ever received any instructions regarding flagging at crossings?

The Witness: No.

Trial Examiner Kent: At no time?

The Witness: At no time, no.

Mr. Maxwell: I think I will ask a couple of questions, in view of the last answer.

Q. (Mr. Maxwell, continuing): You had worked as head brakeman, [291] as I understand it, during the period of the last couple of years. That is, during your period of last employment?

A. Yes.

Q. Had you received any instructions on the safe operation of the train? A. No.

Q. In other words, do I understand then the

(Testimony of Clayton Reece.)

company put you to work as head brakeman, and turned the control of the train over to you,—strike that.

As head brakeman, you have control of the train; you are in charge, in other words?

A. Yes, to a certain extent.

Q. Well, you are the one who gives the orders and tells them where to go, and when to go?

A. Yes.

Q. And you get those orders from the train master or dispatcher? A. Yes.

Q. I understand that you have been put in charge of a logging train, and have never been given any instructions on the safe operation of that train? A. That is right. [292]

DAVID LYTLE

previously sworn, was recalled as a witness by and on behalf of the Board, and further testified as follows:

Trial Examiner Kent: You have a few questions, Mr. Maxwell?

Mr. Maxwell: Yes.

Cross-Examination

(Continued)

Q. (Mr. Maxwell): Mr. Lytle, you testified that on May 21, when you came in on your run, you saw

(Testimony of David Lytle.)

an "X" in front of your name at the call board at the railroad camp?

A. Back of it.

Q. Well, opposite your name? A. Yes.

Q. And you talked with Mr. Grosclose at that time? A. Yes.

Q. Who else was present?

A. It was outside of the office, by the track.

Q. Was anyone else present?

A. Not that I recall.

Q. When you say outside, you mean outside of what?

A. Outside of the office; outside on the track.

Q. You testified further about a conversation with Mr. Ellingson on Saturday, May 25, 1940, in the office in Hoquiam? A. Yes.

Q. Was anyone else present at that meeting?

[293]

A. No.

Mr. Maxwell: That is all.

Redirect Examination [294]

Q. (Mr. Walker, continuing) Mr. Lytle, I direct your attention to an incident on April,—some time in April, 1940, in which you testified that you told Mr. Ellingson that the brakes on a series of cars were not sufficiently set. Will you describe that incident?

Mr. Maxwell: I don't recall any such testimony.

(Testimony of David Lytle.)

That is going pretty far afield from any issue in this case.

Trial Examiner Kent: I remember some testimony,—I don't remember whether it was on direct or cross,—when the witness did testify something about some cars, runaway cars, or something like that. I think that it was brought out on cross. My recollection is that you did bring it out on cross. Read the question, Mr. Reporter.

Do you remember the question that Mr. Walker asked you, Mr. Lytle?

The Witness: What was the question? [296]

Trial Examiner Kent: I think that you had better read it, Mr. Reporter.

(Thereupon the question referred to was read aloud by the reporter as follows:

“Mr. Lytle, I direct your attention to an incident on April,—sometime in April, 1940, in which you testified that you told Mr. Ellingson that the brakes on a series of cars were not sufficiently set. Will you describe that incident?”)

The Witness: Shall I answer?

Trial Examiner Kent: Yes.

A. Well, it was a train of low trucks, and it was coming down from what they call the camp 4 junction to the Humptulips water tank. Those low trucks,—those are the low trucks about which they have a notice on the board posted: “No setting or releasing of hand brakes while locomotive is in mo-

(Testimony of David Lytle.)

tion." The locomotive had slipped a tire; so there was not enough braking power on the locomotive; and there was insufficient hand brakes, too, because you couldn't set sufficient hand brakes while they were stopped and then start the train, because, if you did that you would pull the train in two. So, at the time we came down there, the train was not under control enough to hold the cars,—

Q. Now, did you have a conversation with Mr. Ellingson concerning that? A. Yes. [297]

Q. How did that arise?

A. Mr. Ellingson,—at that time, we passed a section crew, and one of the section crew told Mr. Ellingson we came down too fast, and Mr. Ellingson came to me and asked me about it.

Q. What did you say to him?

A. I told him there probably wasn't brakes enough on it to hold the train without the help of the locomotive, and that she had lost a tire and could not give the braking power which it had before, and it could not be helped.

Q. What did he say?

A. He said that is all he wanted to know.

Q. Was there anyone discharged as the result of that? A. No.

Q. Was there anyone suspended? A. No.

Q. Was there anyone reprimanded?

A. No.

Q. At any time while you worked at the Polson Logging Company, have you been a member of any labor organization other than the Brotherhood?

(Testimony of David Lytle.)

A. Yes, I was a member of the A F of L, and also a member of the IWA for a while.

Q. At any time, did you sever your membership with any of the other unions?

A. With the IWA, I think, about six months before we presented [298] our agreement to Mr. Polson. [299]

Q. At the time you worked for the Polson Logging Company, or during the time that you have worked for the Polson Logging Company, have you worked on a train which pushed a series of cars ahead of it? A. Yes.

Q. When was the last time you did that before your employment ended at Polson?

A. That would be pretty hard for me to recall. That was a long time ago.

Q. Well, how long ago? Was it a year, two years or three years?

A. Do you want me to go into detail?

Q. No. A. It would be,——

Q. When did Mr. Ellingson or when did Mr. Groschlose take over Mr. Gordon's job?

Mr. Maxwell: I will object to that as totally immaterial.

Trial Examiner Kent: I suppose counsel's purpose is to establish some date.

A. 1938, I believe; I am not sure as to that, however. [302]

Trial Examiner Kent: On the record.

Q. (Mr. Walker, continuing) Was it one or two or three years ago?

(Testimony of David Lytle.)

A. It was about two years ago.

Q. You mean it was two years before the time of your discharge?

A. It was just before,—it was before I was discharged on May 21, 1940. It was before that. If I could explain I could tell why we shoved them across.

Q. (Mr. Walker, continuing) When was the last time a series of empty logging cars were pushed out ahead of the locomotive, heading westward out of railroad camp?

A. That was probably in 1934. [303]

Q. (Mr. Walker, continuing) When a train is pushing a string of empty cars at any time, where is the brakeman? A. Out on the car.

Q. Does that apply, whether he is crossing a crossing or not? A. Yes.

Q. Does that apply whether he is crossing a crossing or not? A. Yes, sir.

Q. When you said the brakeman is out on the car, what car is the brakeman on?

A. The head brakeman is usually out on the point; that is, the farthest from the locomotive; and the second brakeman may be back in the middle, or he may be back in the crummy.

Q. Did the time of day have any effect upon the manner in which the trains were operated over crossings? A. Shoving cars?

Q. Any way? A. No.

Q. Would the time of day make any difference

(Testimony of David Lytle.)

concerning the manner of the operation of the train over crossings, if you were [304] shoving cars?

A. No.

Q. (Mr. Walker, continuing) What kind of cars operated on the Polson line?

A. Low, disconnected trucks, and high disconnected trucks, and skeletons.

Q. Who was the trainmaster in 1937?

A. Bill Gordon.

Q. Now, did that accident which occurred in 1937 occur before [305] you were called back to work by Mr. Gordon, or afterwards?

A. Before.

Q. Were you discharged as the result of that accident? A. No.

Q. Were you suspended? A. No.

Q. Were you reprimanded as the result of that accident? A. No.

Mr. Maxwell: There is no evidence of the discharge of Mr. Latonville.

Trial Examiner Kent: Who was Latonville?

Mr. Walker: He was his second brakeman on the train.

Q. (Mr. Walker, continuing) Was he reprimanded?

Mr. Maxwell: Mr. Examiner, I am objecting to this question, and I move to strike the prior question and answer relative to the same incident in 1937, on the ground that the same is incompetent, irrelevant and immaterial to any issue in this case.

(Testimony of David Lytle.)

There is no showing in the record of all the facts of the 1937 accident. If we are going into it, we will have to bring it all out, and that will bring us into a collateral field.

Mr. Walker: That is why I didn't see why counsel went into it on cross examination. I will join with him that it all be stricken.

Trial Examiner Kent: The record may remain, but I see nothing [306] to be gained by going into it further. [307]

Q. (Mr. Walker, continuing) When Mr. Ellingson stopped at the Axford Prairie Crossing on the morning of the 21st, what did he do?

A. He stopped his car.

Q. (Mr. Walker, continuing) And then what did he do? A. Then he got out of his car.

Q. Where had you been just before Mr. Ellingson drove up?

A. Shortly before he drove up, I had been on the flat car straightening out some supplies.

Q. (Mr. Walker, continuing) I direct your attention to your testimony on cross examination when you stated that you had seen Mr. Ellingson at other crossings at other times than May 21st?

A. Yes.

Q. Do you recall that? A. Yes.

Q. At what time of day had you seen Mr. Ellingson at other crossings at different times?

A. As I recall right, in the afternoon. [309]

(Testimony of David Lytle.)

Q. Had you ever seen Mr. Ellingson at any crossing at 5:30 in the morning? A. No.

Q. What was the visibility on the morning of May 21st?

Mr. Maxwell: I will object to that as totally immaterial; it has been gone into. A. Clear.

Mr. Maxwell: Just a moment: I move that the answer of the witness be stricken.

Trial Examiner Kent: The answer may be taken. I remember the engineer testifying, but I don't remember this witness testifying.

Q. (Mr. Walker, continuing) Referring to what has been marked as Board's Exhibit 10, will you indicate with this pen (indicating) where you were standing in the doghouse on the morning of May 21st, at the time you saw Mr. Ellingson drive up? [310]

Mr. Maxwell: Just a moment. I am going to object to this upon the ground that it is totally immaterial. This witness testified that he was in the doghouse when they approached the crossing, and when they crossed it. It doesn't make any difference where he was in the doghouse. The issue here is whether he was discharged for membership and activities in the Brotherhood, or whether he was discharged for violation of the Safety Rules and Unsafe Operation.

Mr. Walker: You asked him where he was.

Mr. Maxwell: I certainly did, and he said he was in the doghouse.

(Testimony of David Lytle.)

Mr. Walker: And I asked him where in the dog-house.

Trial Examiner Kent: The answer may be taken.

A. You want me to mark where I stood?

Q. (Mr. Walker, continuing) Mark that on Board's Exhibit 10.

A. All right. (Witness marking on exhibit)

Q. (Mr. Walker) You have now drawn a circle in ink on the portion of the sketch which indicates the plan of the crummy; is that correct?

A. That is right.

Mr. Maxwell: You had better have him indicate what it is. This zero (indicating) refers to Mr. Lytle?

The Witness: You want me to write here (indicating)?

Trial Examiner Kent: Put your name on there.

The Witness: All right. Here (indicating).

[311]

Q. (Mr. Walker, continuing) I direct your attention to your testimony on cross examination, being directed by Mr. Alex Polson to flag the crossings No. 3 and 5 at night. A. Yes.

Q. Have you been directed by either Mr. Ellingson or Mr. A. M. Polson or Mr. Arnold Polson to flag crossing No. 1, either day or night? [312]

Recross Examination

Q. (Mr. Maxwell) Many years ago a series of

(Testimony of David Lytle.)

disconnected trucks or cars were pushed across crossings ahead of the engine; isn't that correct?

A. From Polson's?

Q. Yes.

A. How many years ago do you mean?

Q. You said in 1934,—you said 1934 was the last time you had done it.

A. That is when I went to work there.

Q. At that time they were pushing empties ahead of the engine in the direction in which it was moving; is that right?

A. I believe they pushed a few trains across there.

Q. That has not been done for some time, has it?

A. No.

Q. And why has that not been done?

Mr. Walker: If you know.

A. They found out they could get around that. They fixed the yard so that they could get around that.

Q. (Mr. Maxwell, continuing) Were you instructed not to push them but to fix up the train so that the cars would be pulled by the engine?

A. It was really no instruction; they really got to pulling them; the trainmen started it themselves.

[313]

Q. Who was Mr. Morgan?

A. Mr. Morgan was the superintendent.

Q. Did Mr. Morgan instruct you not to make up the trains so as to push the cars across the crossings?

(Testimony of David Lytle.)

A. I believe Mr. Morgan,—if I understand it, Mr. Morgan, when he took over at the yard, fixed it up and told them to pull their trains.

Mr. Maxwell: That is all.

Redirect Examination

Q. (Mr. Walker) How was that done?

A. Well, they would pull their train up here,—if they were going to pull the train instead of push it, they would get the train on a track, unhook the locomotive, and switch onto another track and go to the other end of the train. When you shove the cars, you are on the opposite end of the train. When you pull, the locomotive is at the head of the train.

[314]

TONY PLESHA

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. Are you employed by the Polson Logging Company? A. Yes.

Q. How long have you been employed by them?

A. Well, better than 20 years, anyway.

Q. Have you been employed in the railroad service? A. Yes.

Q. When did you start in the railroad service?

A. I think it was 1937.

(Testimony of Tony Plesha.)

Q. Since 1937, what kind of work have you done in the railroad service?

A. Mostly with the construction gang.

Q. Are you a member of any labor organization?

A. Well, yes. [316]

Q. Which one?

A. Well, of course, down here we have the CIO; and we turned around and joined into the Brotherhood.

Q. Now, have you ever done any work on Camp 14 landing? A. Yes.

Q. Do you know Bennett Ellingson?

A. Yes.

Q. Along in April or May of 1940, did you have a talk with Mr. Ellingson about the Brotherhood?

A. Yes. That happened at the landing. We planned to leave a donkey there and Mr. Ellingson, just like always when he comes around, he asked me and the engineer if we belonged to the Brotherhood, and I told him we did, and then he says, "What are you fellows going to do if the Northern Pacific takes you over?" And the engineer answered and said, "Polson still owns the railroad."

Q. Was there anything else said?

A. That is all I know.

Q. Had you heard anything about the Northern Pacific taking it over before this conversation with Mr. Ellingson? A. No.

Q. Have you ever heard anything about it since?

A. No.

Mr. Walker: That is all.

(Testimony of Tony Plesha.)

Cross Examination [317]

Q. (Mr. Maxwell) The Northern Pacific is a common carrier? A. Yes.

Q. If the Northern Pacific took it over, you could still continue to be members of the Brotherhood? A. I think so.

Q. They represent common carrier railroad employees? A. Yes.

Q. Who was present at the discussion that you have referred to? A. What did you say?

Q. Who was present at this discussion?

A. Bert Fenton.

Q. And who was he? A. My engineer.

Q. Was Mr. Ellingson angry when he asked you this? A. No.

Q. (Mr. Maxwell, continuing) Did he speak in an ordinary tone of voice? A. Yes, he did.

Q. (Mr. Maxwell, continuing) Did he say that the Northern [318] Pacific was going to take the railroad over because you were joining the Brotherhood?

A. Well, I couldn't tell you if he mentioned that, of course. [319]

C. B. GROVES

a witness previously sworn on behalf of the Board, was recalled and further testified as follows:

Recross Examination

Q. (Mr. Maxwell) Will you state your name, please? A. Columbus B. Groves.

(Testimony of C. B. Groves.)

Q. You are the same Mr. Groves who has testified here before? A. I am.

Mr. Maxwell: I would like to have the record show that I am calling Mr. Groves for further cross examination.

Trial Examiner Kent: The record may so show.

(Discussion off the record)

Q. (Mr. Maxwell) Mr. Groves, in the operation of the logging trains of the company, there were certain unwritten rules governing the operation, were there not?

A. Well, I don't know what you would call an unwritten rule.

Q. Regulations requiring, for instance, flagging at crossings?

A. Well, we had no regulations, only what we practically used ourselves, as far as I know anything about. I was never told any regulations. [342]

As I stated before, when I went up there, I worked second for about a month and a half. When I got the head job, I was in a camp on a switch engine and I had two crossings to go over.

I also worked second on that same job, and I did just as the other men did.

Q. Were you ever instructed regarding the operation of the trains by Mr. Groseclose or Mr. Ellingson?

A. I was told by Mr. Groseclose at one time that unless Ellingson wanted us to flag the crossings—and at that time I was running over the three cross-

(Testimony of C. B. Groves.)

ings,—I asked him which crossing, and he said “No. 1 crossing”, and I said, “I will stop and flag that crossing”, and he said “No, you don’t have to stop.”

Q. But there were regulations or instructions requiring you to flag those crossings, were there not?

A. I am just stating the facts of what I was told.

Q. As a matter of fact, isn’t it true that there were certain unwritten regulations or instructions which were to be lived up to by the trainmen in the operation of the trains?

A. There might have been, but I don’t know what they would have been.

Q. Well, you testified in a Representation hearing, did you not, held last December, in this Brotherhood’s petition for representation? [343]

A. I did.

Q. On behalf of Polson and Ozette Company employees? A. Yes.

Q. To refresh your recollection—at page 288, Mr. Stevens asked you:

“Q. There are certain unwritten rules that govern your conduct, and in the event that you don’t comply with them, you would expect to be criticized by your employers?

“That is right.”

That is correct, isn’t it? A. That is right.

Mr. Maxwell: That is all.

Mr. Walker: Is that on page 288?

(Testimony of C. B. Groves.)

Mr. Maxwell: That is right, counsel. I think you will find that it is the last question that was asked Mr. Groves by Mr. Stevens. It is near the top of the page.

Mr. Walker: Oh, yes. Just one moment, Mr. Groves.

That is all.

Mr. Maxwell: At this time, Mr. Examiner, I should like to renew my motions to strike the testimony, page 162, line 1 to page 165, line 22. Do you want the argument on the record?

Trial Examiner Kent: Yes, that will be all right.

Mr. Maxwell: This testimony is hearsay. It is incompetent, irrelevant and immaterial. And in so far as it relates to a [344] conversation with Vic Lehman, there has been no proper foundation laid for it.

Mr. Maxwell: I also renew my motion and move to strike the testimony reported in the transcript, page 228, lines 5 to 21.

Trial Examiner Kent: You have already made those motions.

Mr. Maxwell: Yes.

Trial Examiner Kent: I will likewise reserve ruling on that, pending consideration of the entire record.

Mr. Maxwell: I move to strike the testimony of Mr. Lawrence Brant, page 255, line 1 to page 268, line 17, which is the rest of his testimony, upon the ground that the same is totally and wholly

irrelevant and immaterial, incompetent, and has no bearing upon any issue in this case.

Trial Examiner Kent: I will reserve ruling on that, pending consideration of the record.

Mr. Maxwell: At this time, Mr. Examiner, I move for an order directing the dismissal of the charge and complaint in this case, upon the ground that the Board has rested, and the evidence introduced fails to sustain the charges made by the [345] Board in the complaint herein, and that the Board has not sustained the required burden of proof.

Trial Examiner Kent: The motion will be denied without prejudice at this time.

Mr. Maxwell: The respondent will call Mr. Arnold Polson.

ARNOLD POLSON

previously sworn, was recalled as a witness by and on behalf of the Respondent, and further testified as follows:

Direct Examination

Q. (Mr. Maxwell) Your name is Arnold Polson?
A. Yes.

Q. And you are the same Mr. Polson who has testified heretofore?
A. Yes.

Q. Mr. Polson, when did the employees of the Polson Logging Company organize or become affiliated with the Union?

A. They became affiliated in, I believe, 1935.

Q. And what union was that?

(Testimony of Arnold Polson.)

A. The Carpenters & Joiners of the American Federation of Labor.

Q. Do you recall the number or the name of the Local Union? A. No, I don't recall them.

Q. After your employees became affiliated with that union, did you have any dealings with the Union? [346] A. Yes.

Q. And what were those dealings?

A. Oh, such as ordinarily would—oh, ordinary dealings covering the work done in connection with our operations.

Q. Will you explain that a little more fully?

A. Well, we met with the representatives of the Unions at different times at their request to negotiate and adjust different—adjust differences,—that is, the conditions under which the men worked and by which the work of the company was performed.

Q. In 1935, was there any other union than the A. F. of L. Local you have indicated representing your employees? Do you understand my question?

A. There was the Boommen and Rafters Union representing the Boommen and that was the—the rest of our employees were all in the—were all in the larger local on Grays Harbor.

Q. The Logging Company employees?

A. Yes.

Q. Were members of the larger Local?

A. Yes. [347]

(Testimony of Arnold Polson.)

Q. (Mr. Maxwell, continuing) Did you deal with any other union as the representative of your employees? A. No.

Q. How long did your employees remain affiliated or have the A. F. of L. Union as their bargaining agent?

A. I believe until sometime in 1937.

Q. What occurred at that time?

A. They joined the CIO and gave us notice that the CIO was the bargaining agent for them.

Q. Did the company thereafter negotiate with the CIO? A. Yes.

Q. And how long did the CIO represent your employees?

A. It has represented them from that time up to date, and does now.

Q. Have you dealt with any other union since 1937, as the bargaining agent for the employees?

A. No.

Q. How were you informed of the shift from the A. F. of L. to the CIO by your employees?

A. By letter; by letter, and also by different members of the Committees who were in the CIO.

Trial Examiner Kent: You mean the committees that finally served when the A. F. of L. was representing them, came in and told you they were——

The Witness: (Interposing) They came in and told us they [348] were CIO.

Trial Examiner Kent: I see.

(Testimony of Arnold Polson.)

The Witness: They all went over in a body.

Q. (Mr. Maxwell, continuing) Have you served the Polson Logging Company in any other capacity than your present capacity, Mr. Polson?

A. Yes; I have served it in various capacities. Before I was manager, I was superintendent; and before that I worked in various capacities.

Q. As superintendent of the company, what were your duties?

A. The general supervision of the woods operation of the logging company which included the location of the railroads, the construction, the bucking and falling, train operations, supervision of the logging equipment, the yarding and loading and the unloading of the logs at the boom,—general supervision of the entire operation.

Q. When did you serve in the capacity of general superintendent?

A. From 1930 until the early part of 1934.

Q. Since 1934, have you continued in a supervisory capacity?

A. Yes. I was,—for a time there, I was both manager and superintendent, and in 1934, there was another superintendent appointed under me, as I was acting as manager.

Q. Will you state whether or not the company had any rules or regulations regarding the operation of their trains? [349]

A. Yes, they did have rules and regulations.

(Testimony of Arnold Polson.)

Q. In what form were those rules and regulations?
A. They were verbal.

Q. What did those rules and regulations concern, Mr. Polson?

A. They concerned the dispatching of the trains, the operation of certain signal boards, sending flag men out if the train stopped when there was another one behind it, and also rules covering flagging crossings.

Q. Calling your attention to the date in the year 1940, were those rules and regulations in force at that time?
A. They were.

Q. How long had those rules and regulation been in force?

A. Those rules and regulations had been in force,—I don't know how long, but they were in force in the early 20's.

Q. Calling your attention to the year 1940, I will ask you whether or not the logging railroad crossed the state highway at any points?

A. In 1940, it crossed it at three points.

Q. What were those three points?

A. They were crossings, 1, 3 and 5.

Q. Were any of those crossings given other designations than Nos. 1, 3 and 5?

A. They were sometimes described. The No. 1 crossing was sometimes described as the Axford Crossing; the No. 3 crossing was generally,—was nearly always referred to as the No. 3 [350] crossing; and the No. 5 crossing was either called that or the Ozette crossing.

(Testimony of Arnold Polson.)

Q. What were your regulations regarding the flagging of these crossings?

A. All trains were required to flag if there was anything ahead of the engine. If there was only the crummy or caboose, the brakemen were instructed to get out on the head end and if the engineer didn't slow down so that everything was under full control, in case the crossing was occupied, that they would slow the engineer down so that you could stop. If there were other cars ahead,—if there were more than that, they were instructed to stop and then flag the crossing.

Q. Was it the custom of the company to make up their trains so that the engine would push the crummy and other cars ahead of the engine, in the direction in which it was going?

A. In 1940, it was generally the custom to only push the crummy ahead of the engine, although there were cases occasionally where there were empties pushed ahead.

Q. Where there were empties and the crummy pushed ahead of the engine, what did your flagging regulations require?

A. They required that the engine stop; that the engine stop and then be flagged across.

Q. Well, by whom? A. By the brakeman.

A. And where was that flagging done from? [351]

A. It was done from the head end of the train.

Q. Did the brakeman remain on the train?

(Testimony of Arnold Polson.)

Mr. Walker: Just a moment. I object to that as just leading.

Mr. Maxwell: All right.

Q. (Mr. Maxwell, continuing) Where was the brakeman when he flagged?

Mr. Walker: I object to that as repetition. He has already answered that question.

Trial Examiner Kent: He may answer.

A. If there was just the one car ahead of the engine?

Q. (Mr. Maxwell, continuing) The question was, I believe, if they were pushing the crummy and some empties ahead.

A. In that case, the brakeman was to stop the train and get off and look, and then if the road was clear, flag them on.

Q. If they were pushing only the crummy ahead of the engine, what did your regulations require?

A. They required that the train be slowed down enough to be under full control for an emergency stop, if necessary, and then when they got to the highway, the head brakeman would give the signal for the men to proceed.

Q. From what point would the brakeman flag?

A. From the forward part of the crummy.

Q. How were these regulations enforced, Mr. Polson?

A. They were enforced by,—well, those were standing orders; and they were enforced by the inspection of different people in [352] supervisory capacities.

(Testimony of Arnold Polson.)

Q. Do you know of your own information whether or not the regulations and rules were observed and followed by the trainmen?

A. They were.

Q. Mr. Polson, calling your attention to the date of May 21, or a few days shortly thereafter, did Mr. Ellingson make a report to you concerning the flagging of any crossing? A. Yes.

Q. And what was that report?

A. He reported that the,—that a train had failed to flag the No. 1 crossing, and told me he had been out there on one of his inspections and had noticed it. He said there was nobody out on the front end of the car to flag.

Q. Did he state who the brakemen were on that train? A. Yes, he told me.

Q. Who were they?

A. They were Lytle and Reece.

Q. Did you talk with anyone else concerning this incident?

A. I later talked with Mack Polson about it.

Q. Who was present at that time?

A. The first time we talked, we were alone, and later, Mr. Ellingson and Mack and myself were present.

Q. You refer to Mack Polson, and that is—

A. (Interposing) Alec. [353]

Q. A. M. Polson or Alec Polson?

A. A. M. Polson, or Alec Polson.

Q. Where did this conversation take place?

(Testimony of Arnold Polson.)

A. The conversation between the three of us took place at the railroad camp.

Q. And will you state what transpired there?

A. We had a general discussion over the failure of this train to stop at the crossing, as that is something that we have had to watch all the time, and it is something that had been watched, as there had been several serious accidents caused by cars hitting trains, and it was——

Mr. Walker: (Interposing) Just a moment. I object to the witness going into any reason why they held a discussion on it. The fact that they held a discussion is the ultimate fact.

I move that that portion of the witness' answer beginning with the word "as" and subsequent thereto, be stricken.

Trial Examiner Kent: It may be stricken. You may inquire further.

Q. (Mr. Maxwell, continuing) What was said at that time regarding the failure of this crew to flag the No. 1 crossing,—to the best of your recollection?

A. Well, there was discussion as to why they had failed to flag it, and there was no good reason, nor nothing developed as to why, to account for that failure. I guess that is all. [354]

Q. Pardon? A. That is all.

Q. Was anything reached as to a decision as to what was to be done because of their failure to flag?

A. Yes.

Q. What was that decision?

A. To discharge them.

(Testimony of Arnold Polson.)

Q. And were they discharged?

A. They were.

Q. Mr. Polson, calling your attention to the date of May 21, 1940, do you recall what occurred on that date,—correction,—May 16, 1940, do you recall what occurred on that date?

A. Mr. Lytle contacted me and asked me if I would meet with a committee the following Saturday.

Q. Refreshing your recollection, I hand you a calendar for May, 1940. I will ask you if he contacted you first on May 18?

A. I believe it was about that date,—let's see, the 18th is on Saturday. No, he contacted me previous to that.

Q. Did you meet with a committee on May 18?

A. I did.

Q. And what committee was that?

A. It was a committee composed, I believe, of Mr. Lytle, Mr. Reece, Sam Key, Mr. Williams and Mr. Lawrence Brant.

Q. Will you state where the meeting was held? [355]

A. The meeting was held in the offices of the Polson Logging Company at about 11:00 o'clock in the morning.

Q. Where are these offices?

A. At the corner of 8th and Levee Streets, in Hoquiam.

Q. Was anyone else present representing the company besides yourself?

(Testimony of Arnold Polson.)

A. Mr. A. M. Polson and Bennett Ellingson.

Q. Now, will you state what transpired at the meeting on May 18?

A. I was presented with a letter and a form of an agreement by Mr. Lytle of the committee.

Mr. Maxwell: Off the record for a moment.

Since we haven't the—

Trial Examiner Kent: You can use the copies and name them as marked.

Q. (Mr. Maxwell, continuing) Handing you herewith Board's Exhibit No. 4, I will ask you if that is the letter and the agreement received by you?

A. Yes, this is a copy, I believe.

Q. Now, will you tell just exactly what transpired at that meeting, after you were given the letter and the agreement marked Board's Exhibit No. 4?

A. I was handed the letter and requested,—and they requested that it be signed. I told them that I couldn't sign it, that we had an agreement with the IWA Local of the CIO, where they [356] were the bargaining agency. But they kept on pressing and wanted an answer, and I told them that I would refer that agreement to our attorney. And they asked for a written reply, and I told them that after I had had a chance to take it up with an attorney, that I would write them regarding it.

Q. Do you recall anything else that transpired at that time?

A. Yes. There was quite a little conversation.

(Testimony of Arnold Polson.)

In presenting it, they gave all the reasons for presenting it—they volunteered it—that they were dissatisfied with the IWA, and that they were leaving it, as they felt—that they were leaving it, as they preferred the other—expressed a preference for the —for the other bargaining agency—they expressed a preference for a change.

Q. What union, if any, did they express a preference for?

A. They expressed a preference for, I think, the Brotherhood of Firemen, Locomotive & Enginemen and the Brotherhood of Trainmen.

Q. Did you say anything in response to that?

A. Well, they kept questioning and talking and made one remark——

Q. Speak up a little louder; I can't hear you.

A. They kept asking questions and I remarked that I was rather surprised because I had met with a good many of them, or met with the different ones on this committee when they were representing the CIO.

Q. Calling your attention to the testimony of Mr. Lytle, the [357] transcript page 58, I will ask you if this is correct, or substantially correct:

“A. And he”—referring to you, Mr. Polson —“wanted to know why we were pulling out of I.W.A.”

Did you ask them that?

A. No, I didn't ask them that.

(Testimony of Arnold Polson.)

Q. Stating and quoting further from the official transcript, page 58, Mr. Lytle testified:

“He”—meaning you,—“said he thought we would be better off by staying in the IWA and not splitting it up, as he was running a logging camp and not running a railroad.”

Did you state that, or substantially that?

A. No. There was general conversation there, but I don't believe that those were the words, I don't believe.

Q. What is your collection of what was said? You said that there was conversation?

A. Well, I believe that I expressed surprise of their pulling out of the IWA, because I had met with different ones of them on committees for the IWA.

Q. Do you recall stating that you thought they would be better off if they stayed in the IWA?

A. No, I think that on that, that when they were inquiring about that, I believe I told them that whatever the union that they belonged to, that was for them to decide, that the company couldn't mix in it. [358]

Q. Referring further to the transcript, page 58, Mr. Lytle said that you

“thought that one union would be better than two”.

Was anything further said on that?

A. Well, I don't believe that I was advising

(Testimony of Arnold Polson.)

them what union to belong to. As I said before, the matter of the Union choice was up to them; we couldn't interfere.

Q. Did you state that, "that two would probably give us the jurisdictional dispute"? A. No.

Q. I beg your pardon? A. No.

Q. Referring to the official transcript, page 59, line 23, Mr. Lytle quotes you as saying,

"Mr. Polson said he thought they were making a mistake."

Did you make that statement?

A. That I told them I thought they were making a mistake? No.

Q. Referring to the official transcript, page 60, Mr. Lytle quotes himself as saying to you:

"You be sure to give us a written answer to our letter".

Did Mr. Lytle ask you that?

A. Yes, I was asked that.

Q. Did you reply to that?

A. Yes; I said that I would give them an answer. [359]

Q. Did you thereafter give them an answer?

A. I did.

Q. And handing you Board's Exhibit 3, I will ask you if that is the answer that you gave him?

A. Yes.

Q. Did the National Labor Relations Board thereafter conduct a Representation hearing?

(Testimony of Arnold Polson.)

A. They did.

Q. What was the result of that hearing?

A. That the application of the Railway Brotherhoods to be a bargaining agent representing certain employees of the Polson Logging Company and Ozette Railway Company was denied.

Mr. Maxwell: I would like to ask that the decision of the National Labor Relations Board in Representation Cases Nos. XIX R 538 and XIX R 539, and the Board's decision therein, bearing Board's No.—

Mr. Walker: R 2217 and R 2218.

Mr. Maxwell: (Continuing) —be taken notice of by reference.

Trial Examiner Kent: You mean—you are not offering the transcript?

Mr. Maxwell: No, I am just calling the attention of the Board to the decision in those cases.

The Member: Yes. The record may so show.

Mr. Maxwell: Your witness.

Cross Examination [360]

Q. (Mr. Walker) Mr. Polson, calling your attention to your testimony concerning the meeting of May 18, 1940, and particularly where you testified that the committee kept questioning you and in reply to that you expressed surprise because you had met with some of the committeemen when the same were representatives of the CIO; now, will you tell us in what words you expressed your surprise to the

(Testimony of Arnold Polson.)

men who had left from the IWA for the Brotherhood? A. Expressed surprise?

Q. Yes, sir.

A. Well, I don't believe that I could give you the—I don't believe that I could give you the exact words, but it was from—from my recollection of the meeting, it was friendly and it was mild, and there was no strong language used, and if it was anything, it was done in a friendly way.

Q. Well, can you tell us what your words were in expressing your surprise to the men? What did you tell them that conveyed your surprise?

A. I don't—I don't remember exactly, but I was surprised to see a group come in, I think some of them were in not very long previously, on a committee, and then to have them in again representing another one,—another organization.

Q. Now, on May 21st, Mr. Ellingson reported to you that he had discovered that Mr. Lytle and Mr. Reece had failed to flag crossing No. 1, is that correct? [361]

A. He reported that they had failed to flag the crossing, very shortly after that failure.

Q. And you and Mr. A. M. Polson and Mr. Ellingson conferred on the matter? A. Yes.

Q. As the result of that, it was determined to discharge Mr. Lytle and Mr. Reece? A. Yes.

Q. And they were discharged because of failure to flag crossing No. 1, is that correct? A. Yes.

Q. You, yourself, have checked on the movements

(Testimony of Arnold Polson.)

of the train to determine whether or not the trainmen do flag crossings, is that correct?

A. I have, at different times.

Q. Prior to May 21, 1940, when was the last preceding time you did that?

A. I do it whenever I can, when I am driving along the road, but I couldn't give you the exact date of it.

Q. About how long?

A. Well, I am up there fairly frequently, but I couldn't give you the—I might be up there two or three times a week, and then it might be for a week or more than I wouldn't be up there. But when I see, when I know there is a train near, why, I will wait and see. [362]

Q. Then the last time you made a check preceding May 21, 1940, it was sometime in the week preceding May 21?

A. I didn't say that. It was not very long before that, but I couldn't give you the exact date.

Q. Sometime in that week or the week preceding the week,—either a week or two weeks preceding May 21st? A. Yes.

Q. What train did you observe?

A. I don't recall.

Q. What crossings?

A. They were crossing—let's see. Again, I don't recall. That happened over a year ago.

Q. What kind of a train?

A. Well, I have seen both loaded trains—both trains of loads and empties.

(Testimony of Arnold Polson.)

Q. Where were the empties, before or after the engine?

A. The empties were generally behind the engine.

Q. Now, how did the brakeman go about flagging the crossing, whichever one it was,—this incident where the train was pulling a string of empties?

A. Well, I remember one case. I can't give you the crew or the date, when they come up and I was standing there, and they come up and stopped and then took a look around before they went on. The car was standing there.

Q. Which crossing was that? [363]

A. I don't remember the crossing.

Q. Were you in or out of your car?

A. I was in the car. I didn't get out.

Q. All right. When the train stopped, then what happened? A. Then they went on.

Q. How long did they stop?

A. They just stopped, took a look, and went on.

Q. Was that in accordance with the regulations of the company? A. Yes.

Q. What kind of empties were they at that time?

A. I don't remember

Trial Examiner Kent: By the way, are there more than one type of empties? The record might be a little bit confused.

The Witness: Yes, there are. We have both the connected and disconnected. We have both the skeleton cars and the disconnected trucks, I should say.

Trial Examiner Kent: What is the distinction between the two?

(Testimony of Arnold Polson.)

The Witness: The distinction is that a skeleton car has a reach,—the timber is the full length of it, in between the trucks, on both ends. And in the disconnected trucks, they,—the logs themselves form or keep, — the trucks are placed under each end of the load and there are no connecting timbers.

[364]

Q. (Mr. Walker, continuing): How far from the crossing did the train stop?

A. Well, it is not right at the crossing.

Q. (Mr. Walker, continuing): How far were you from the train [365] at that time?

A. Oh, I don't remember exactly; maybe 50, or 100 or 150 feet.

Q. Now, did the brakemen get out and flag the train? A. He was already out.

Q. Who was it? A. I don't remember.

[366]

Q. But you can't recall which one, if any, of those was the brakeman?

Mr. Maxwell: I submit that that is argumentative. The question has been answered.

Trial Examiner Kent: You may take the answer.

A. No, it was somebody that I knew, but I didn't pay any particular attention to it. There was nothing to fix it in my mind. The work seemed to be going all right.

Q. (Mr. Walker, continuing): Now, have you acquainted any of your trainmen with your oral rules and regulations?

(Testimony of Arnold Polson.)

A. I satisfied myself when I was up there as superintendent [369] that they were acquainted with them, and that they knew them.

Q. Whom did you tell them to?

A. Well, I travelled on the train, the different trains, at that time, and talked with them about them and found that they knew.

Q. (Mr. Walker, continuing): What did you tell them?

A. Well, I tried to conduct it in the nature of a visit and talked it over and told them — and not to conduct a quiz contest.

I found that they knew them and that they were observing them, and they kept on that way.

Q. Did you ever acquaint any of your trainmen during the period that you were superintendent with your oral regulations concerning flagging of crossings? A. Yes.

Q. Now, how did you go about that?

A. I asked them if they stopped at the crossings when they had empties ahead, and if they were then flagging the train across if the road was clear. I told them that that was something [370] that we told them that we wanted to enforce that rule.

Q. Anything else? A. What do you mean?

Q. Well, is that all that you said to your trainmen in acquainting them with that oral regulation?

A. I couldn't say that those were the exact words, but I kept supervision right along with the trainmaster to see that the flagging of the crossings and the other rules were enforced.

(Testimony of Arnold Polson.)

Q. Is the sum and substance of what you said in acquainting your trainmen with the flagging, oral regulations during the period when you were superintendent, to the effect that you asked the trainmen if they were stopping the trains when pushing empties ahead over crossings?

A. Well, it was something that I asked them and that I kept watch of when I was riding around, riding on trains.

Q. Is that the sum and substance of what you said to them in acquainting them with that oral regulation?

A. They already knew those regulations because they had all been up there some time. [371]

Q. (Mr. Walker, continuing): During the period when you were superintendent, in acquainting your trainmen of the company's oral regulations concerning flagging crossings, was the sum and substance of your communication to the trainmen that you asked the trainmen if they were stopping the trains when pushing empties ahead over crossings?

A. I made sure that they understood those,—the rules concerning stopping when they had empties ahead of them and flagging across.

Q. When you were acquainting your employees of the company's regulation concerning flagging crossings, did you, in effect, tell them that the trainmen were to stop the train when pushing empties ahead over crossings?

A. I told them that I wanted that—the gist of it

(Testimony of Arnold Polson.)

was that I told them that I wanted that rule lived up to. It was an old rule. [372]

Q. What did you tell them about the rule?

A. Just what I have said.

Q. What was it?

A. That when they were pushing empties ahead of the engine, that they were to stop and flag the crossing.

Q. Now, did you tell them anything else in addition to that?

A. Well, it has been over ten years, and I can't give you that conversation verbatim. That is about as close as I can come to it. They apparently knew and understood.

Q. Did you tell any of the trainmen anything else concerning the oral regulation of flagging crossings, in addition to what you have just described?

Mr. Maxwell: Will you repeat that?

(Whereupon the last question was read.)

A. There might have been other points that I talked with them—talked over with them.

Q. (Mr. Walker, continuing): Concerning other oral regulations?

A. Concerning others,—and perhaps this,—perhaps stopping at the crossings.

Q. Well, you say there might have been. Now, this was a rule and regulation of the company, is that correct? A. Yes.

Q. And you wanted the employees to observe the rules and regulations? [373] A. Yes.

(Testimony of Arnold Polson.)

Q. And you wanted to communicate the rules and regulations to the employees, is that right?

A. Yes.

Q. Now, in communicating your rules and regulations to the employees, did you tell them anything else concerning the manner in which trains should be operated across crossings under the flagging crossing regulations?

A. I couldn't give you everything that I said just verbatim. That has been—1934, has been the last.

Q. What you have described as what you communicated to the trainmen, does that constitute the full extent of the company's oral regulation concerning flagging crossings?

A. No. There is also when they have—if they had the crummy ahead, I might, as in this case here.

Q. (Mr. Walker): What about it when they had the crummy ahead?

A. Flag. [374]

Q. (Mr. Walker, continuing): Well, what did you tell the employees about what to do when the crummy was ahead?

A. Flag.

Q. To flag the crossing? A. Yes.

Q. And did you tell them how to flag the crossings?

A. To approach the crossing—to slow down on approaching the crossing so as to have the train under control so that they could stop if the crossing was occupied. And they were to be out.

(Testimony of Arnold Polson.)

The Witness: The trainmen were to be out on the crummy so as to flag.

Q. (Mr. Walker, continuing): Now, did you instruct any of your trainmen in how to flag a crossing?

A. You mean, get out there and give them an example of how it should be done, is that what you mean? [375]

Q. Well, did you do that? A. No.

Q. Did you instruct your employees on how to flag a crossing? A. Verbally.

Q. (Mr. Walker, continuing): Did you tell your employees that flagging a crossing meant to stop the train, the brakemen get off, walk ahead of the train, stand on the highway with a flag while the train crossed the crossing? [376]

A. There were instructions in one instance as to that procedure.

Q. (Mr. Walker, continuing): And that was the instance where empties were being pushed ahead of the train, is that right?

A. Where they have empties.

Q. I beg your pardon?

A. Where they have empties ahead of the train.

Q. And that is the only time that you instructed your employees that it was necessary to flag a crossing, is that correct? A. No.

Q. What else was necessary to flag a crossing?

A. When they had anything ahead of the engine. [377]

(Testimony of Arnold Polson.)

Q. Now, what do you mean "anything"?

A. When they had a car ahead of the engine.

Q. Even one car? A. Yes.

Q. Including the crummy?

A. Do you count the crummy as a car?

Q. If that car was just the crummy?

A. If that car was just the crummy, they would flag that across, but by a different procedure than the one you have just previously mentioned.

Q. All right. What is the other procedure?

A. To have a brakeman get out on the head end and flag the train down if it was proceeding too fast, so that it could approach the crossing at slow enough speed so that it could stop, if the crossing was occupied, or if there was anything approaching that they weren't sure would stop.

Q. (Mr. Walker, continuing): What did you mean by the phrase that the brakeman was to be out on the crummy so that he could flag the train down?

A. So that he could give signals to the engineer. [378]

Mr. Maxwell; Just a moment. That is an improper question.

Trial Examiner Kent: Reframe the question.

Q. (Mr. Walker, continuing): Under the Company's oral rules, who was the brakeman to flag?

A. The train,—the engineer. He might also give warning to the approaching vehicles. If he—

(Testimony of Arnold Polson.)

Q. (Interposing): Well, which is it?

A. Both, I would say—if he can keep the train out of the way.

Trial Examiner Kent: Check my recollection. I believe the testimony, as I remember it—the crummy is always the next car preceding the engine, whether or not there are empties ahead of it; that is, even if there are empties ahead, the crummy just precedes the engine, doesn't it?—It isn't on the end?

The Witness: It might be on the head end of the empties, or it might be next to the engine, between the engine and the empties, or it might be on the other end of the engine and the empties ahead,—with the engine in between the crummy and the empties.

Q. (Mr. Walker, continuing): Now, what brakeman did you personally communicate that oral regulation to? A. At what time?

Q. When you were superintendent. [379]

A. That covers a period of four years or pretty close.

Q. That is right.

A. The brakemen on the payroll at that time.

Q. All of the brakemen? A. Yes.

Q. Did you instruct Mr. Thomas as to what the rule was as you have described it here?

A. I don't know.

Q. Did you instruct Mr. Williams as to what the

(Testimony of Arnold Polson.)

rule was in the manner that you have described here?

A. I would have to see who was on at that time, because that was during a period of curtailed operations by the company and I don't know—I couldn't recall personally without looking up the records, whom I instructed.

Q. Will you do that, then? A. All right.

Q. Now, have any of the trainmen, since the rule on flagging as you have described it was promulgated, violated that rule other than Mr. Reece and Mr. Lytle? A. I don't know. [380]

Mr. Walker: Well, that is all, Mr. Polson, until you have had a chance to check your employment records and ascertain who were employed as brakemen from the period of 1930 until 1934.

Mr. Maxwell: Do you want every one?

Mr. Walker: Every one.

Redirect Examination

By Mr. Maxwell:

Q. Mr. Polson, in order to get the picture clear, what was the instructions regarding the flagging of a highway crossing when the engine was pushing ahead of it in the direction in which it was going, the crummy and several empties?

A. They were to stop at the crossing,—stop at the crossing before proceeding across.

Q. And what was the brakeman to do?

A. He was to get off and flag. That is, assure

(Testimony of Arnold Polson.)

himself that [386] it was safe to proceed across, and then flag the train across.

Q. In the event the engine was proceeding and pushing ahead of it only the crummy car, what was the requirement regarding the flagging of a highway crossing?

A. They were to flag the engine,—they were to flag the train down so that they could stop if the crossing was occupied or if there was danger of a collision, and then to get the train under control.

Q. And where was the brakeman supposed to be in doing this?

A. He is supposed to be out on the crummy, or on the head end of the crummy.

Q. Has there come to your attention,—or has it come to your attention that brakemen have failed to flag the crossing, other than in the case of Mr. Lytle and Mr. Reece?

A. I don't recall any.

[387]

Q. (Mr. Maxwell, continuing): Handing you for identification what has been marked for identification Respondent's Exhibit 1, what are those?

A. Those are loggers' safety standards evolved by the Department of Labor and Industries for the State of Washington.

Q. Do the rules and regulations therein govern your logging operations?

A. They do.

Q. I will ask you whether or not copies of Respondent's Exhibit 1 were passed out to and made available to your employees?

A. Yes. [390]

(Testimony of Arnold Polson.)

RESPONDENT'S EXHIBIT No. 1

STATE OF WASHINGTON

Clarence D. Martin
Governor

Department of Labor and Industries
E. Pat Kelly, Director

LOGGERS SAFETY
STANDARDS

(Seal of the State of Washington)

Jay Olinger
Supervisor of Safety

Fred J. Englert
Supervisor of Industrial
Insurance

Chas. D. Davis
Chief Engineer

Effective January First, 1936

Standards of Safety
for the

LOGGING INDUSTRY

Issued by the
Department of Labor and Industries
of the

STATE OF WASHINGTON

Effective January 1, 1936

Olympia

State Printing Plant

1935

(Testimony of Arnold Polson.)

EMPLOYERS' RESPONSIBILITY

B—1 It shall be the duty of employers to provide and install all the protective devices specified in these standards, and upon the discharge in a reasonable manner of the duties imposed upon the employer in these standards, any penalty which might otherwise be assessed by reason of accidents caused by violation of these standards shall not be placed on the employer if the absence of such guard, protection or protective device be due to the removal thereof or the failure to use or apply any of these rules by the injured workman himself or by a fellow workman, unless such removal be by order or direction of the employer or superintendent or foreman of the employer or anyone placed by the employer in control or direction of such workman.

B—2 It shall be the duty of employers to appoint only men believed to be competent to supervise other workmen; and those appointed shall in every reasonable degree be responsible for the safety of the men under their supervision.

B—3 It shall be the duty and responsibility of employers to make available to all concerned employees copies of these Safety Standards when same have been furnished by the Department of Labor and Industries, and to keep a copy posted upon the bulletin board of the operator.

(Testimony of Arnold Polson.)

SAFETY MEETINGS

F—1 Employers should organize monthly safety meetings and provide a suitable meeting place for same and encourage workmen or key men to attend such meetings.

RAILROAD OPERATIONS

V—1 All persons employed in any service on trains or rail operations are subject to and shall be conversant with all rules and special instructions.

V—2 Employees must render every assistance in their power in carrying out these rules and special instructions and must report to the proper official any violation thereof.

V—4 Any logging railroad operation may maintain a special set of operating rules applicable to their operation, provided that said rules are acceptable to the Safety Division of the Department of Labor and Industries.

V—27 Unless equipped with air, no equipment shall be pushed ahead of locomotive, unless a brakeman is on head car in constant view of the engineer.

IMPORTANT SECTIONS OF STATE SAFETY LAWS

The State Safety Laws provide for certain fines, criminal prosecution and diminished compensation for violation of the safety standards. Section 7731 of the Code, compels every employer to furnish his

(Testimony of Arnold Polson.)

workmen with a safe place to work in and to furnish all devices and safeguards and comply with all safety rules and regulations of the Department of Labor and Industries.

By Section 7732 of the Code, every workman is required to cooperate with his employer in the safety program. Should an employer or workman remove or destroy any safety device or safeguard, such employer or workman shall be prosecuted criminally for a misdemeanor, and be liable to imprisonment in the county jail for not more than ninety days or pay a fine of not to exceed \$250.00.

The Department of Labor and Industries is required by law to enforce all safety laws and rules in the State. The Department safety inspectors are required to inspect all employers engaged in extra-hazardous work at least once a year or more frequently if desired. (Sec. 7774.) For the failure of any employer to comply with any safety rule or regulation of the Department for thirty days after having received a written notice from the Department to do so, such employer shall be subject to a penalty of not to exceed \$1,000.00, which the Department will collect by suit and pay into the Accident Fund.

Should any workman be injured because of the failure of the employer to maintain proper safety protection, as prescribed by the Department or the safety laws, the employer shall be further assessed the penalty of 50 per cent of all compensation paid

(Testimony of Arnold Polson.)

such injured workman by the Workmen's Compensation Act, and the employer is subject to the same penalty if the employee shall be under age at the time of injury. This penalty, however, shall not be assessed if the accident was caused by the removal of any safeguard by the injured workman himself or by his fellow workmen, unless the removal were under the direction of the foreman or superintendent of the employer. If the removal of any safeguard or protection required by law is done by the injured workman or with his consent by any fellow worker without the order of the employer, the injured workman's compensation from the Department of Labor and Industries shall be decreased 10%. (Sec. 7683.)

Every employer having less than 50 workmen is required to keep at his plant a first aid kit and if he employs over 50 men within a half mile of his plant or works, the employer must keep a first aid station. The contents of the first aid kit and the first aid station must be prescribed by the Department and constitute part of the safety regulations of the State.

Safety rules adopted by the Department after public hearing have the same effect as any law of the State of Washington.

(Testimony of Arnold Polson.)

Trial Examiner Kent: It may be admitted.

(Whereupon the document heretofore marked for identification as Respondent's Exhibit 1, was received in evidence.) [391]

Recross Examination

Q. (Mr. Walker): Mr. Polson, as a result of conversations held between yourself and Mr. Alec Polson and Mr. Ellingson, it was determined to discharge Mr. Lytle and Mr. Reece because of their failure to flag Crossing No. 1, is that correct?

A. Yes.

Q. Is that the sole reason that they were discharged?

A. That was the reason for their discharge.

Q. (Mr. Walker, continuing): Now, to what employees—did you personally pass out any copies of Respondent's Exhibit 1 to your trainmen?

A. No, I didn't personally pass them out. [393]

Q. (Mr. Walker, continuing): You previously testified that copies were passed out to employees, did you not? A. Yes.

Q. How do you know that?

A. Because they were in camp. They were made available to them. They were put in the bunkhouses and different ones in the different camps passed them out. I went through some of the camps—I went through the camps to see if they were, an I found out that they were.

Q. You are talking about logging camps?

(Testimony of Arnold Polson.)

A. I am talking about all of the camps.

Q. Does that include railroad camps?

A. It does.

Q. Who told you that copies were passed out to your trainmen?

A. The timekeeper of the railroad.

Q. Who is that?

A. I believe that is Mr. Golick, at that time.

Q. When did Mr. Golick tell you that?

A. After they had been sent out and after he and others had been instructed regarding passing them out.

Q. When were the copies sent out to the railroad camp?

A. They were sent out as soon as they were made available to [394] us after they were published.

Q. When were they made available to you?

A. They were made available to us, within, I would say, a month or so after their publication.

Q. Did you ever find out whether Mr. Golick did do that? A. Yes.

Q. From whom did you find that out?

A. I found out from him, and from others in the different camps.

Q. Well, how about railroad camps?

A. I found out from others. I found out by going up there and making a personal investigation.

Q. You made a personal investigation after Mr. Golick told you that he had passed out the copies

(Testimony of Arnold Polson.)

and found out that he had passed them out, is that correct? A. That is correct.

Q. And how did you go about that investigation?

A. I went up to camp and saw that they were out, that they were made available—that he had a notice out to—for everyone—a notice to everyone to take a copy, and then I made inquiry of different ones if they were—if they had copies.

Q. Whom did you inquire of?

A. I inquired of—in the shop and of the trainmen.

Q. What trainmen did you inquire of?

A. I don't remember. [395]

Q. Well, did you ask all of the trainmen if they had copies?

A. I didn't go around and ask every one if they had copies, no.

Q. How many trainmen did you ask if they had copies? A. I don't remember. [396]

A. M. POLSON

called as a witness by and on behalf of Respondent, being duly sworn, testified as follows:

Direct Examination

Q. (Mr. Maxwell): Will you state your name, please? A. A. M. Polson.

Q. And are you employed by the Polson Logging Company? A. Yes, sir.

(Testimony of A. M. Polson.)

Q. In what capacity are you employed?

A. General superintendent.

Q. How long have you held that position?

A. Since the fall of 1938.

Q. As general superintendent, what are your duties?

A. Well, it is the general overseeing of all of the woods operations, from the—starting with the engineering and the [400] construction, the laying of steel, falling and bucking, yarding and loading, trains and hauling, and the dumping of the logs, and the maintenance of all of the machinery.

Q. Calling your attention to the operation of the Polson Logging Company, I will ask you whether or not the company has any safety rules and regulations? A. Yes, they have.

Q. In what form are those rules and regulations?

A. Well, there are some written rules and some—mostly, they are generally verbal.

Q. Calling your attention to the train operations, I will ask you whether or not there is any rule or regulation regarding the flagging of crossings? A. Yes, there is.

Q. In what form is that rule?

A. That has been a verbal rule.

Q. What is the rule?

A. For flagging the crossings, the brakemen are required to ride the forward end of the train as it is moving, at all times, and if there are empties

(Testimony of A. M. Polson.)

or cars ahead of the engine, the brakeman is to stop the train before it comes to the crossing and get off on the ground to see that there is no traffic coming and everything is clear before he proceeds.

And if there is only one car ahead of the engine, the brakemen are required to be on the car near the forward end, [401] and within sight of the engineer or the fireman and slow the train down, if necessary, before coming to the crossing, and to proceed across the crossing by flagging the engineer only if it is safe to do so.

Otherwise, he is to stop the train until it is safe and then flag the train to proceed.

Q. Was that rule in force on the 21st day of May, 1940? A. Yes, sir.

Q. How long prior to the 21st day of May, 1940, had the rule been in force?

A. Well, to my recollection, I came to work in the early part of 1929, and it was in practice then—in force then.

Q. In your capacity as superintendent, what, if any, checks have you make as to whether or not this rule is observed?

A. I have ridden on the trains and been at the crossings from time to time when the rule had either been—would have been observed or violated.

Q. Has been observed or violated?

A. Would have been observed or violated.

Q. Did you ever observe the violation of the rule? A. No, I haven't.

(Testimony of A. M. Polson.)

Q. Calling your attention to the car that has been referred to as the crummy car, I will ask you whether or not that car is equipped with air?

A. Not in the sense of the ordinary terms. A car to be equipped [402] with air must be equipped with serviceable brakes that are air operated.

The crummy cars are equipped for the purpose of passing the air through them to the other cars only. By that, I mean that they have a train line through the car and that is all.

Q. Assuming that the engine was pushing the crummy car ahead of it and towing empties behind it, could the air brakes be set from the crummy car?

A. Would you read the question again, please?
(Last question read.)

Mr. Maxwell: I will clarify that a bit.

Q. (Mr. Maxwell, continuing): When I say "ahead of the engine," I mean that the engine is backing up and it is ahead of the engine in the direction that the engine is going.

A. Yes, I think they could.

Q. How would they be set from the crummy car? A. By opening the angle cock.

Q. And where is the angle cock?

A. On the forward end of the crummy.

Q. Mr. Polson, calling your attention to the date of May 21, 1940, I will ask you if you saw Mr. Bennett Ellingson on that day? A. Yes.

Q. Where did you see him? [403]

A. At railroad camp.

(Testimony of A. M. Polson.)

Q. Who is Mr. Bennett Ellingson?

A. He is the man who is in direct charge of the operation and maintenance of the trains and train service in our organization.

Q. Did Mr. Ellingson make a report to you on that date? A. Yes, he did.

Q. And what was that report?

A. He reported to me that there had been a violation of the regulations requiring the flagging of crossings at what is known as the No. 1 or Axford Prairie Crossing.

Q. Well, state what transpired there at the meeting with Mr. Ellingson, if you recall?

A. He reported to me that the engine 18 had gone out that morning quite early, and that he had been headed that way, and that when he got to the crossing, the train was coming and there was no one in sight on the crummy car, and that in checking up he found that Mr. Lytle and Mr. Reece were the brakemen in charge of that train. And he reported the incident to me at railroad camp, and also reported that he had watched these fellows before, doing about the same thing, and thought we should discharge them, and I agreed with his judgment.

Q. Subsequent to May 21st, did you at any time talk over with anyone the failure of Mr. Lytle and Mr. Reece to flag the Axford Prairie Crossing on the morning of the 21st? [404]

(Testimony of A. M. Polson.)

A. Yes; Mr. Arnold Polson and Bennett Ellingson and I talked it over again shortly after that.

Q. And what decision was reached?

A. That the men should be discharged.

Q. Mr. Polson, calling your attention to the date of May 18, 1940, I will ask you what transpired upon that date?

A. May 18, was on the Saturday that the committee of our employees who work on our train service came to our office in Hoquiam. They had an appointment to meet with the officials of the company there at the office in Hoquiam at 11 o'clock, I believe it was,—and they brought with them the form of an agreement and letter of transmittal and presented them to Arnold Polson, and they asked for an answer as soon as possible to the letter. They expressed that they wished to have an agreement signed. They expressed themselves that they were pulling away from the IWA and joining the Brotherhood and wished to negotiate that agreement.

Q. Who was present for the company?

A. Arnold Polson and Bennett Ellingson and myself.

Q. Who acted as spokesman for the company?

A. Arnold Polson.

Q. What reply did Mr. Arnold Polson make to this committee representing the Brotherhood?

A. Well, he asked that the company be given time to study it over and get the legal advice,—get

(Testimony of A. M. Polson.)

some legal advice from [405] an attorney to see whether the company had a right to negotiate with any other committee other than the ones representing the I W of A, which we already had an agreement with.

Q. Mr. Polson, referring now to the official transcript on page 58, the testimony of Mr. Lytle, Mr. Lytle said:

“And he”,—Arnold Polson, “wanted to know why we were pulling out of the IWA.”

Did Mr. Arnold Polson inquire as to that?

A. No, he didn't. The boys, when they came in to talk to us, volunteered the information that they were pulling away from the IWA, and that they were going to join the Brotherhood.

Q. Referring again to the official transcript, Mr. Lytle says:

“He”—Arnold Polson—“said he thought we would be better off by staying in the IWA and not splitting it up”.

Did Mr. Polson make that statement,—well, I will finish the statement—

“as he was running a logging camp and not running a railroad.”

A. No, I can't recall him making that statement.

Q. Do you recall any statements substantially the same as that by Mr. Polson?

A. No, I don't,—I don't think that I do.

Q. Referring again to the official transcript, Mr. Lytle [406] says that Mr. Polson stated

(Testimony of A. M. Polson.)

“that he thought that one union would be better than two.”

Did Mr. Polson make that statement?

A. I don't remember of hearing that.

Q. Was a statement similar to that made by Mr. Polson? A. I don't remember.

Q. Mr. Lytle further stated that Mr. Polson said,

“that two would probably give us jurisdictional dispute”.

Do you recall that? A. No, sir; I don't.

Q. Referring again to the official transcript, Mr. Lytle's testimony is as follows:

“Mr. Key and Mr. Brant told him”—Arnold Polson—“that they thought they would be better off in the Brotherhood; that they had joined the Brotherhood and that they wanted the Brotherhood to represent them.

“Q. Did Mr. Polson say anything to that?

“A. Mr. Polson said he thought they were making a mistake.”

Do you recall any such statement by Mr. Arnold Polson, as that?

A. No, I don't recall him saying that.

Q. Were you present at all times during this meeting?

A. Yes, I was there until it was over. [407]

Q. Referring again to the official transcript, and the testimony of Mr. Lytle:

“So we terminated our meeting there, and I asked Mr. Polson for an answer to our letter.

(Testimony of A. M. Polson.)

“Q. What did you say to him?”

“A. I told Mr. Polson, ‘You be sure to give us a written answer to our letter.’ And he said, ‘I will.’”

Do you recall that?

A. I don’t recall at what time he told them he would give them an answer to their letter, but I recall that they asked for it several times.

They were very insistent about having a written answer to their letter, and he said he would give it to them.

Q. Did he at any time indicate that he would not give it to them? A. No.

Q. Referring again to the official transcript, page 63, quoting Mr. Lytle’s testimony,

“A. I said, ‘Be sure to give a written answer to our letter.’”

“Q. Did Mr. Polson say anything to that?”

“A. He said, ‘I will; and don’t forget what I have told you.’”

Do you recall Mr. Polson making a statement to that effect? “Don’t forget what I have told you”?

[408]

A. No, sir; I don’t.

Q. Will you describe this meeting on May 18th and what transpired there, generally?

Mr. Walker: I object to that as repetitious.

Trial Examiner Kent: Well, of course, it may be or it may not be. It probably won’t take long to take the testimony.

(Testimony of A. M. Polson.)

Mr. Maxwell: Off the record a moment?

Trial Examiner Kent: Yes.

(Discussion off the record.)

Trial Examiner Kent: The witness may answer the question.

The Witness: Will you read the question, please?

(Whereupon the question referred to was read as follows:

“Q. Mr. Maxwell): Will you describe this meeting on May 18th and what transpired there, generally?”)

A. Well, it is pretty much as I related. These boys from the train service came in and brought that letter and their proposed agreement with them, and it was just,—it lasted probably about 20 minutes or half an hour, and they told us what they wanted.

They said what they had to say, and went on about their business again. It was a very friendly meeting. There was nothing unusual about the meeting at all. It was pretty much the average run of negotiating meetings,—probably on the mild side, I would say.

Mr. Maxwell: Your witness. [409]

Mr. Examiner, and Mr. Walker, Mr. Polson would like to leave now. He would like to be gone for about half an hour or forty-five minutes. Will you want him during that period?

(Testimony of A. M. Polson.)

Mr. Walker: I don't think so.

Trial Examiner Kent: Yes, surely.

Mr. Walker: Were you through with the witness?

Mr. Maxwell: Yes. Your witness.

Cross Examination

Q. (Mr. Walker): Just as the meeting broke up on May 18, did Arnold Polson walk towards the door with the committeemen as they were going out the door?

A. I don't recall what the actions were right at the last part of the meeting. The whole group of us were—when we finished our business and started to leave, we were all talking, one with the other, and I don't—I didn't notice his actions,—where he was.

Q. Well, let's go back to the meeting as a whole. During the course of the meeting, the representative of the company and the representatives of the union sat around the table in the office there, isn't that correct?

A. Yes. There was a table there. They sat around in more or less of a circle.

Q. And you were sitting over by the table, weren't you? A. Yes. [410]

Q. And when the meeting broke up, the representatives of the Brotherhood went out the door first, isn't that correct?

A. I couldn't swear to that.

Q. At the conclusion of the meeting, you remained at your place by the table, didn't you?

(Testimony of A. M. Polson.)

A. As I recall it, I was in the room after the rest of them left. I recall that, sir.

Q. In other words, you stayed in the room where you were sitting there by the table as a committee and Mr. Arnold Polson walked over to the door, isn't that correct?

A. I couldn't answer that, sir; I don't know where he went when the meeting broke up,—whether he stayed there for a short time or not; I couldn't answer that.

Q. I believe that you misunderstand me. I don't mean that Arnold Polson concluded the meeting and went out of the room. I mean that he just walked over to the door.

A. I understand what you mean.

Q. And then after he came back he went over to where you and Mr. Ellingson were sitting there by the table. Now, does that refresh your recollection?

A. No, I can't get a sequence there that is—I can't recall that he came back into the room, or when he left the room. That was a year ago. [411]

Q. (Mr. Walker, continuing): Do you have the recollection of Mr. Polson, at the conclusion of the meeting, walking over to the door with the committeeman, not going out of the room, and during that time you and Mr. Ellingson remained where you had been throughout the whole course of the meeting, over by the table? [413]

The Witness: I don't have any recollection of Arnold's movements after the meeting was over

(Testimony of A. M. Polson.)

and it broke up and the boys started to leave, I don't have any recollection of it.

Q. (Mr. Walker, continuing): I call your attention to your testimony on direct examination in which you testified that as superintendent you had been to crossings and ridden on trains to see if the rule had been observed or violated.

How frequently prior to May 21, 1940, had you ridden trains for that purpose?

A. I wouldn't say that I had ridden trains for that one particular purpose at any time. I have observed the movements of trains and the manner in which they are operated at all times when I am on them or see them operating. [414]

Q. How frequently prior to May 21, 1940 did you observe the manner in which trains were operated?

A. Well, I would say that I have no definite schedule as to any of my particular duties. As general superintendent, I check the trains whenever I want to, or see them operating, to see whether they are doing their job right or not.

Q. (Mr. Walker, continuing): And about how frequently was that?

A. Well, there would hardly be a day go by when I wouldn't either see a train operating or be where they were operating.

Q. And from early 1929 when you became superintendent, until May 21, 1940, did you ever observe trains being operated with the crummy being

(Testimony of A. M. Polson.)

pushed ahead when brakemen were not on the head car in full view of the engineer?

A. Yes, I have.

Mr. Walker: That is all.

Redirect Examination

Q. (Mr. Maxwell): Were you superintendent in 1929, Mr. Polson? A. No, sir. [415]

Q. Where was the train when you saw the crummy being pushed ahead of the engine and the brakeman wasn't in full view of the engineer?

A. When a train leaves the landing at the unloading grounds at the river, both brakemen usually catch the back end of the train and walk over the empties towards the head end, as they pull out.

There is no crossings in that vicinity, no camps.

Occasionally, there is a section crew or a few men working on a track, but that is all that there could possibly be in the way of a train coming back from the landing. At that time, the crummy car is being pushed ahead of the engine and there is very likely no brakeman on it.

Q. For how long a period would the crummy car be pushed before the brakemen got to it, ordinarily?

A. That would depend upon the length of the train, how long it would take the brakemen to get back there. If it is fine weather, he might take his time. If it is raining, he might hurry up.

Mr. Maxwell. That is all.

(Testimony of A. M. Polson.)

Recross Examination

Q. (Mr. Walker): Have any of the brakemen ever been discharged for not being on the crummy, in full sight of the engineer, when the engine is pushing the crummy ahead?

A. Mr. Lytle and Mr. Reece were. [416]

Q. Anybody else?

A. Not to my recollection.

Q. Have any of these braking crews, as the train is coming away from the logging dump, been discharged for not being out on the crummy in full sight of the engineer as the crummy is being pushed by the engine?

A. No, I don't remember of any time.

Q. (Mr. Walker, continuing): Have any braking crews been reported to you as failing to ride the front end of the string of empties being pushed ahead of the engine across crossings?

A. No, sir; I don't remember of any being reported to me.

Trial Examiner Kent: I am a little confused as to the rule. Does the rule that we have been talking about require that both—there are two brakemen ride in the crummy, aren't there, [417] in the dog house?

The Witness: There are two brakemen on the train, yes, sir.

Trial Examiner Kent: Well, does the rule require that both of them be up front, or either one?

(Testimony of A. M. Polson.)

Mr. Maxwell: You are referring to where they are pushing the crummy only?

Trial Examiner Kent: Well, yes, it would apply there. I think I had a more general situation in mind.

As far as my recollection goes, I was wondering if it would make any difference? Are both required to ride up in front, or just one of the two?

The Witness: It would be different in different situations.

Trial Examiner Kent: Which one would it be?

The Witness: It would depend upon which end of the engine the empties were on, of the train itself they were on. It would also depend upon what train work or what train movements were immediately ahead of the engine, or what that—rather, what the train crews had to do next. Usually they are—the work of a train crew is on the end of the engine that the loads or empties are on.

When they are going out light, the majority of next things to do for the crew is up ahead. That is where the crummy is, usually.

Trial Examiner Kent: That is all the questions that I have. [418]

Q. (Mr. Walker, continuing): Since you have been superintendent until May 21, 1940, have any brakemen of any braking crews been observed by you failing to stop a train, get off, walk ahead, and flag a crossing when an engine is pushing a string of empties ahead of it at a crossing?

(Testimony of A. M. Polson.)

A. No, sir; there haven't been any.

Q. (Mr. Walker, continuing): Has anything of that nature been reported to you since you have been superintendent until May 21, 1940?

A. I don't recall of any.

Mr. Walker: That is all.

Redirect Examination

Q. (Mr. Maxwell): Mr. Polson, you referred to the train pulling out of the logging dump, or the landing, I mean.

A. Yes, sir.

Q. What were the trainmen doing ordinarily while the train was at the landing there?

A. They were assisting in unloading the logs—the two brakemen on each train handle the hook. One handles the hook, and the other one trips the stakes on the bunks that hold the logs on the cars.

Usually their job finished up on the far end of the train or near the middle of the train,—from the middle of the [419] train on up towards the far end. They have anywheres from half to all of the empties to cross when they are coming back to the engine and to their dog house.

Q. And that period, then, when the train might be pushing the crummy ahead of it without the man on it would be that period of time when they were going from their last place of work to their station on the crummy?

A. That is right.

BENNETT ELLINGSON

called as a witness by and on behalf of Respondent, having been first duly sworn, testified as follows:

Direct Examination

Q. (Mr. Maxwell): Will you state your name, please? A. Bennett Ellingson.

Q. Will you spell the last name?

A. E-l-l-i-n-g-s-o-n (spelling).

Q. Are you employed by the Polson Logging Company, Mr. Ellingson? A. Yes, sir.

Q. In what capacity are you employed?

A. Assistant superintendent. [420]

Q. As assistant superintendent, what are your duties?

A. I work under the superintendent's orders.

Q. What phases of the logging operation do you have charge of?

A. Well, I have several different things. I have grievances, cookhouses, camps, carpenters, repairing trestles, bridges, railroads, railroad logging trains.

Q. I will ask you whether or not the Polson Logging Railroad crosses the state highway?

A. Yes, sir.

Q. At what points does it cross the state highway?

A. Do you mean what sections?

Q. No. How are these crossings commonly designated?

A. Well, the first crossing, No. 1, is the No. 1 or Axford Prairie Crossing. There is the No. 3 crossing and No. 5. Also, there is a No. 6.

(Testimony of Bennett Ellingson.)

Q. Was there a No. 6 crossing on the 21st of May, 1940? A. I don't think there was.

Q. On the 21st of May, 1940, what if any, regulations did the Polson Logging Company have regarding the operation of trains across these crossings?

A. What were their rules?

Q. Yes; regarding the operation of trains across the highway crossing.

A. The performance they had to go through in order to get over [421] this crossing is that it—

Q. (Interposing): Well, did they have any rules regarding the operation of trains over the highway crossings; were there any rules? A. Yes.

Q. And what did those rules concern?

A. They were very strict rules.

Q. Well, what; what did they relate to?

A. Blowing of whistles and different conditions there.

Q. Well, different conditions. What are the conditions?

A. You want me to explain what the conditions were, is that it?

Q. Yes.

A. Well, for showing a string of empties which they don't do very often, but we do it occasionally; on a string a man gets off at the crossing and goes out in the highway. If the road is clear, he flags them ahead, the engineer. The second brakeman is supposed to be on duty along with him, and as a rule stands on the crummy.

If it is a long train, he would probably be in

(Testimony of Bennett Ellingson.)

the middle of the train or somewheres along there.

Q. If the train is proceeding, pushing only a crummy ahead of it, what do the company regulations require?

A. One of those brakemen, and usually both of them, are out there, but one of them has got to be out there. [422]

Q. Out where?

A. On the front end of this crummy, and see that everything is clear, and then give the engineer a signal to go.

Q. Was this rule in force and effect on the 21st of May, 1940?

A. Yes, sir.

Q. How long prior to that time was this rule in force and effect?

A. Well, I don't know the exact date that I started to work for this company, but it is close to around 17 years, and it has been in force all of that time.

Q. What has been done to enforce the observance of this rule by the train crews?

A. By everyone connected with the head of this outfit watching it very carefully.

Q. Have you observed trains crossing the highway crossings, as to whether or not the rules regarding flagging have been obeyed by the railway crews?

A. Have they been obeyed?

Q. Had they been obeyed?

A. Well, if they hadn't of been obeyed, it would have been the same thing as happened on this last occasion.

(Testimony of Bennett Ellingson.)

Q. Calling your attention to the date of May 21, I will ask you what happened on that date?

A. What took place in the beginning of the day?

[423]

Q. On May 21st, yes.

A. Well, the first duty was to get out of bed and head for camp, per usual. I leave home all the way from three o'clock in the morning to hardly ever later than five o'clock. That particular morning, I was into the camp a few minutes, into the headquarters camp, and from there I was headed towards Quinault.

Going through the Prairie, after I left the railroad camp, I caught up with Engine 18, Locomotive 18, and followed it practically all the way through the Prairie, which is quite a little distance there where the railroad parallels with the highway. Coming to this crossing, I beat the train to the crossing.

Q. What crossing do you refer to?

A. No. 1 crossing, the Prairie crossing. The engineer was blowing his whistle, per usual, shoving, —backing up, shoving the crummy ahead of him.

On this crummy, I didn't see any brakemen. The door was closed on the crummy.

(Testimony of Bennett Ellingson.)

I sat in the car, right alongside of the road, right next to the track, and as the train went on, I stepped out of the car, as the train passed, and then waited until the empties got by.

Q. Then what did you do?

A. I went back to the railroad camp. [424]

Q. What did you do at the railroad camp?

A. I walked over to the board and marked off Mr. Lytle and Mr. Reece's names.

Q. And who was Mr. Lytle and who was Mr. Reece?

A. Mr. Lytle was head brakeman, and Mr. Reece was second.

Q. Did you see anyone at railroad camp at that time? A. The trainmaster.

Q. And who is the trainmaster?

A. George Groseclose.

Q. Did you have any conversation with Mr. Groseclose at that time?

A. I told him not to put those two men back to work until I talked with them.

Q. Later on the day of May 21st, did you have a conversation with anyone regarding the failure of Mr. Lytle and Mr. Reece to flag No. 1 crossing?

A. I talked to Mr. A. M. Polson, the superintendent.

Q. And where was that?

A. At railroad camp.

Q. And what was said at that time?

A. Oh, I told him what had happened on this crossing.

(Testimony of Bennett Ellingson.)

Q. Anything else?

A. It sounded quite serious to him,—the same as it did to me.

Q. Did you report to anyone else on that day, on May 21st, [425] this incident of their failure to flag?

A. I called Mr. Polson that evening, or the next morning, Arnold Polson.

Q. Where was this report made? Where was this report made to Mr. Polson, Arnold Polson?

A. From railroad camp.

Q. And where was Mr. Arnold Polson?

A. In the office in Hoquiam.

Q. Subsequent to May 21st, and your reporting to Mr. Arnold Polson and Mr. Alec Polson this incident, was there any further conversation among you concerning it?

A. Yes. I met with Mr. Arnold Polson and Mr. A. M. Polson at the railroad camp.

Q. When did this meeting occur?

A. Within a few days or a day or two after that.

Q. What transpired at that meeting?

A. It was talked over.

Q. What was talked over?

A. What happened at this crossing, at that railroad crossing.

Q. What happened,—what incident; let's have it specifically.

A. I explained to them what happened and the decision was made that we would have to let them go.

Q. Did you talk with Mr. Lytle or Mr. Reece on

(Testimony of Bennett Ellingson.)

May 21st, after their failure to flag the crossing. [426]

A. I talked with Mr. Lytle, I think that it was the following Saturday.

Q. And where was this conversation?

A. I think,—it was at Polson's office in Hoquiam.

Q. Will you state what was said at that time?

A. Well, I know we had a very friendly little talk.

Q. Well, what was said?

A. Lytle wanted to know what we were going to do about what happened out there. I told him that it was a pretty serious thing, and I talked it over with Mr. Arnold and Mr. Alec Polson, and his decision was that we couldn't take him back.

Q. What did Mr. Lytle say regarding the failure to flag the crossing?

A. He had said that he knew he was in the wrong for doing it.

Q. Prior to May 21st, 1940, had you had a conversation with Mr. Lytle regarding the flagging at crossings? A. Yes, sir.

Q. When did that occur?

A. It occurred after he had a runaway, along in about April.

Q. And what was said at that time?

A. I talked on the telephone at first and I was to meet him at his home. I stopped in at his home here in town. He had been off then a couple of days because I told the trainmaster at that time not to take him back until I talked with him?

Q. Concerning what? [427]

(Testimony of Bennett Ellingson.)

A. Concerning a runaway that happened.

Q. Well, what was said when you talked with Mr. Lytle at his home?

A. What it concerned?

Q. What was said? A. What was said?

Q. Yes. You have testified the occasion was this runaway, and what was said at that time that you remember talking about?

A. He wanted to know what it was all about that he wasn't called back there the next day or two, and I told him that it was due to that runaway.

I wanted to find out what caused that runaway.

Q. Anything else?

A. He thought, well, probably they didn't have enough brakes set. Well, I told him that was no excuse, that he had been on that run for a long time and he should have had enough brakes set. I told him that we hadn't been in the habit of starting down that grade until the brakes were set, and plenty of them. "Well," he says, "the second brakeman started over the train to set brakes, and lost his brake stick." "Well," I says, "Dave, I will give you another chance up there, but you fellows have got to be more careful from now on."

I says, "You have been plenty careless," and I says, "Don't forget the safety rules, especially on those crossings. We want those crossings flagged,—and that means both of you [428] fellows" which was Reece and Lytle.

Q. In your capacity as assistant superintendent, have you done anything to see that the safety rules

(Testimony of Bennett Ellingson.)

regarding the flagging of crossings was enforced and observed by the train crews? A. Yes, I have.

Q. What have you done?

A. I have constantly watched them crossings and trains all the way through.

Q. Referring to the 18th of May, 1940, I will ask you what occurred on that date?

A. That was the date of a meeting with some of the employees.

Q. Where was this meeting held?

A. Polson's head office here in town.

Q. And what was the occasion of the meeting?

A. Well, there was a group of trainmen that were in on a new agreement, to set up a new union for the trainmen.

Q. Were you present at that meeting?

A. Yes, sir.

Q. Did you remain at the meeting all throughout the entire period of the meeting? A. Yes.

Q. Referring now to the official transcript, and quoting Mr. Lytle's testimony, Mr. Lytle said:

"I handed Mr. Polson the agreement, with a letter, and told Mr. Polson we would like to negotiate with him." [429]

Did that occur?

A. What was that question again?

(Whereupon the last question was read.)

The Witness: Yes.

Q. (Mr. Maxwell, continuing): What was Mr. Polson's reply?

(Testimony of Bennett Ellingson.)

A. That he would have to think it over and take it up with an attorney.

Q. Quoting again Mr. Lytle's testimony at page 58 of the transcript, Mr. Lytle said:

"And he," referring to Arnold Polson,—“wanted to know why we were pulling out of the IWA.”

Do you recalled that inquiry by Mr. Arnold Polson? A. No, I don't think I do.

Q. Was anything said regarding the men leaving the IWA? A. Not that I recall.

Q. Do you recall Polson saying, “that he thought we”—referring to the crew—“would be better off by staying in the IWA and not splitting it up, as he was running a logging camp and not running a railroad.”

A. No, I don't remember hearing that.

Q. Do you recall Mr. Polson saying that he thought one union would be better than two?

A. Not that I remember of.

Q. Do you recall Mr. Polson saying that “two would probably give us a jurisdictional dispute”?

[430]

A. No, I don't remember hearing that.

Q. Do you remember or recall Mr. Key and Mr. Brant stating, and referring to the transcript, page 59:

“that they thought they would be better off in the Brotherhood; that they had joined the Brotherhood and that they wanted the Brotherhood to represent them”?

(Testimony of Bennett Ellingson.)

A. Yes, I think that I remember them saying that.

Q. To which the next question was:

“Q. Did Mr. Polson say anything to that?”

“A. Mr. Polson said he thought they were making a mistake.”

Do you recall Mr. Polson making that statement?

A. That he thought they were making a mistake?

Q. Yes.

A. For switching over to a different union? No, I don't remember hearing them saying anything like that, that I recall.

Q. State substantially what transpired or was said at that meeting.

A. Well, I remember it was a very friendly meeting. They went away friendly. I remember those two things quite well.

They talked along the lines of the two,—switching over to a different union.

Q. Referring to pages 74 and 75 of the transcript, Mr. Lytle testified that you asked him if

“we were going into the Brotherhood.”

“We” referring to the railroad employees; do you recall ever [431] asking—

The Witness (interposing): What was that statement again, now?

(Whereupon the last question was read.)

(Testimony of Bennett Ellingson.)

Mr. Maxwell: That you had asked Mr. Lytle if the trainmen were going into the Brotherhood?

The Witness: I remember one time about Dave telling about belonging to the Brotherhood for a good many years.

Q. (Mr. Maxwell): The incident referred to, he says further, and this is Mr. Lytle's statement:

“I was standing on the gangway of the locomotive at that time; we were both standing there; the locomotive was running. And I told him that we were,—that most of us belonged, and that I had belonged for a long time. That is all the conversation there was.”

Do you recall that incident?

A. I remember him telling me about the Brotherhood.

Q. Did you inquire of Mr. Lytle whether or not he was a member of the Brotherhood?

Mr. Walker: I submit that has already been answered, and object to it as being repetitious.

Trial Examiner Kent: Well, the answer may be taken.

Mr. Walker: He has already said that he remembers Mr. Lytle telling him that Mr. Lytle had been a member of the Brotherhood for a long time.

[432]

Mr. Maxwell: That wasn't the question, counsel.

Trial Examiner Kent: Read the pending question.

(Testimony of Bennett Ellingson.)

(Whereupon the question referred to was read as follows:

“Q. Did you inquire of Mr. Lytle whether or not he was a member of the Brotherhood?”)

Trial Examiner Kent: You may answer.

A. No, I didn't inquire.

Q. (Mr. Maxwell): Referring to the testimony of Mr. Wood who was called by the Board, and at page 112 of the transcript,—page 111 and 112, the question was:

“On or about May 1, 1940, did you have a conversation with Mr. Ellingson about the Brotherhood?”

“A. Yes, I remember that very distinctly.

“Q. Where did that take place?”

“A. That took place at what they call the dump siding by Old Camp 6.

“Q. What was said at that conversation?”

(Off the record a moment.)

There are a lot of side remarks here that I would like indicated as having been skipped. My statement of that referring to the Brotherhood and Mr. Walker's “Yes”, and my remark, “Was this April first or May first?”

“Q. (Mr. Walker): When was it?”

“A. Well, it was along about that time; I don't remember the date myself.” [433]

Trial Examiner Kent: Yes, that may be omitted.

“Q. (Mr. Walker, continuing): What was said at that conversation?”

(Testimony of Bennett Ellingson.)

“A. Well, we had pulled in there on the siding and were waiting for another train, and I was alongside the engine, and Mr. Ellingson came up to me, and he said, ‘How is she working?’ I said, ‘Pretty good.’ Then I said, ‘It is working pretty good.’ Then I said, ‘There is a lot of work that needs to be done on the engine.’

“Q. Did you or Mr. Ellingson say that?

“A. Well, maybe I said that. We were talking about it. Anyhow, Mr. Ellingson said, ‘We were figuring on putting this engine in the shop and getting it overhauled; and there is a lot of repair work to be done on other engines.’ But he said, ‘This Brotherhood trouble has come up, and I don’t know how much trouble we are going to have, and it has knocked it all in the head. If there is going to be a lot of trouble, it is going to be shut down.’ I said I didn’t see why there should be any trouble. I told him, ‘It is a cinch the men don’t want any.’ Then he said, ‘This man Groves has brought this trouble up. He is a trouble maker, anyway.’ I told him that I didn’t think Mr. Groves had brought up anything any more than anyone else; that if he had, I didn’t know anything about it. I told him that there wasn’t anything that [434] anybody had brought up; that we were all dissatisfied with the setup in the CIO, and we talked it over and made up

(Testimony of Bennett Ellingson.)

our minds to go into the Brotherhood. At that time he didn't like it, he wasn't very well satisfied,——”

That last part was stricken.

Do you recall such a conversation with Mr. Wood?

A. No, sir; I don't.

Q. Do you recall along about the first of April or May, of talking with Mr. Wood at the old Camp 6 pump siding at all?

A. I might have talked with him most any place.

Q. Did you inquire of Mr. Wood whether or not they were going into the Brotherhood?

A. No, sir.

Q. Did you state to Mr. Wood that you were not going to repair any of the engines because Brotherhood trouble has come up? A. I did not.

Q. Did you state to Mr. Wood that Mr. Groves was a troublemaker? A. No, sir.

Q. Have you ever talked with Mr. Lytle regarding the flagging of crossings? A. Yes, sir.

Q. Do you recall in 1937 having any discussions with Mr. Lytle, as follows: reading from page 155 of the official [435] transcript:

“One night I got out to flag No. 3, flagging with a load at night.

“Q. And what did he say?

“A. He told me not to flag the crossing any more.”

A. Who said that?

(Testimony of Bennett Ellingson.)

Q. Mr. Lytle testified that, "One night I,"—
Mr. Lytle,—

"got out to flag No. 3, flagging with a load at night"

"Q. And what did he say?" Referring to you.

"A. He told me not to flag the crossing any more."

A. In shoving cars ahead at the crossing.

Q. That is the only testimony that was given here; that you told Mr. Lytle not to flag the crossing any more.

A. At one time, when we were pulling cars back at night, we got out and flagged them crossings, and later on we cut that out—when we were pulling cars back of the engine.

Q. Distinguish between, or explain what you mean,—pulling cars across?

A. Well, that is with the engine ahead of a trainload of a train of cars.

Q. Would anything be ahead of the engine?

A. Well, crummy as a rule, and sometimes it is 'way behind on the tail end of them at nights.

Q. If the crummy was ahead of the engine, would the crossing be flagged? [436]

A. Yes, sir.

Q. If the crummy,—and all of the cars,—were behind the engine, would the crossing be flagged?

A. Yes, sir. What I was speaking of—those

(Testimony of Bennett Ellingson.)

cars, where I told him that he could discontinue flagging the cars back of the engine——

Q. (Interposing): Well, explain what——

A. (Interposing): At that time we were hauling cars out to Quinault.

Q. By hauling, do you mean pulling them?

A. Pulling them. And one man would get on the crossing, get off of the crummy as they came to the crossing. One man would stay on and flag the crummy across, and the other fellow would step off on the highway and stay there until those empties had gone by, and then he would get on the tail end of the train of empties. They would either stop the train after they got across the crossing, or he would get on and walk up over the string of cars.

The thought was taken up and it was figured that it was just as dangerous for that man to walk up that string of empties at night,—he was taking just as much of a chance as to pull that string of empties over the crossing.

Q. At this time, were you referring to the man riding the crummy and flagging it across, or the man getting off on the highway while the train passed over the highway? [437]

Mr. Walker: I object to that.

The Witness: I——

Mr. Walker: That is repetitious. He explained that.

Q. (Mr. Maxwell, continuing): In your in-

(Testimony of Bennett Ellingson.)

structions not to flag, to which man did you refer?

A. Either one of those men.

Mr. Walker: I make the same objection.

The Witness: Do you want me to answer it?

Trial Examiner Kent: Yes. You may answer, but state what you said.

The Witness: I remember telling Dave that when they were pulling a string of these skeletons over that crossing, that the man that hopped off on the road, off from the crummy, that he wouldn't have to do that any more. Always one man was to stay up on this crummy and flag the crummy across, and the other fellow would hop off on the crossing and stay there on the highway until the cars had passed through, and then he would catch the tail end of those cars. He would either catch the tail end and walk the full length of those cars, or the train would pull into the clear and he would walk up, which they done for a while.

But they never let a train go across without they were—if they were shoving a crummy, without being on the front end of it, and flagging, per usual.

After dark, they signal their engineer with a light. [438] Does that explain it?

Trial Examiner Kent: Yes, I think that is all right.

Q. (Mr. Maxwell, continuing): Referring to the testimony of Mr. Harlan who was called as a witness by the Board, at page 226 of the transcript, the question was:

(Testimony of Bennett Ellingson.)

“Q. On or about April 1940 did you have a talk with Mr. Ellingson about the Brotherhood?

* * * * *

“The Witness: There was nothing said about the Brotherhood.

“Q. (Mr. Walker, continuing): What was it that was said?

“A. Mr. Ellingson stopped me as I was going in, and he said that he thought that C. B. Groves was leading us astray.”

Did you have such a conversation with Mr. Harlan?

A. Harlan asked me at one time what I thought of the Brotherhood.

Q. Did you state to Mr. Harlan that you thought that C. B. Groves was leading the men astray?

A. No, sir; I did not.

Q. Did you ever make a statement to Mr. Harlan or to anyone else that Mr. Groves was leading the men astray? A. No, sir.

Q. Did you ever state to Mr. Harlan, from page 228 of the transcript,

“Mr. Ellingson made a statement one time that the Northern [439] Pacific was going to take it over. It was a statement made on the engine.”

A. No, I never made any statement to Harlan about those things.

Q. Did you ever make that statement to anyone?

(Testimony of Bennett Ellingson.)

A. No, sir.

Q. Referring to the testimony of Mr. Lytle, do you recall an occasion in April or May, 1940, on one day in which there were two wrecks, and riding with Mr. Landi on a flat car?

A. Yes, I do.

Q. Do you recall whether or not Mr. Hill was present at that time?

A. Yes, I think he was.

Q. Quoting now in the transcript,

“Q. And what was said at that time?

“A. They had a couple of wrecks down there. And he was talking about,—he thought they were bucking down there, that there were two unions in there, and they were bucking—something like that, he mentioned. Then he said, ‘One of them fellows is down here now.’ He didn’t say who it was, but I heard him.”

Did you make that statement to Mr. Landi?

A. No, sir.

Q. Did you make that statement to anyone?

A. No, sir. [440]

Q. Referring to page 237 of the transcript, at which Mr. Hill states that you said,

“‘It looks like they are bucking.’ That is what he said, and then he said, ‘Some day somebody,—some day they will all be going down the road.’”

Did you make that statement?

A. No, sir; I did not.

(Testimony of Bennett Ellingson.)

Q. Did you make the statement that one of the men was leading the men into the Brotherhoods?

A. No, sir.

Q. Mr. Hill quotes you as saying at page 240 of the transcript,

“Well, he said when he got on,—when he got on, he started talking to Mr. Landi, and he said that it looked like they are bucking. He says, ‘In this here Union’,—and he says, there is one of them down,—he says, ‘There is one of them down there now.’ And then he said, ‘It looks like he is leading the men astray.’ ”

Did you make such a statement to Mr. Landi?

A. No, sir; I did not.

Q. Did you make such a statement to anyone?

A. No, sir.

Q. Quoting the witness again, he said that you say:

“Some of these days I will let them all go.”

A. I didn't say any such thing. [441]

Q. Referring to the testimony of Mr. Plesha, who was called as a witness for the Board:

“Along in April”——

page 317,——

“Along in April or May of 1940, did you have a talk with Mr. Ellingson about the Brotherhood?”

“A. Yes. That happened at the landing. We planned to leave a donkey there and Mr.

(Testimony of Bennett Ellingson.)

Ellingson, just like always when he comes around, he asked me and the engineer if we belonged to the Brotherhood, and I told him we did, and then he says,

‘What are you fellows going to do if the Northern Pacific takes you over?’ And the engineer answered and said, ‘Polson still owns the railroad.’”

Did you make such a statement?

A. No, sir; Plesha asked me if the Northern Pacific was going to take the railroad over.

Q. And what was your reply?

A. I told him anything might happen these days; I hadn't heard of any such a thing. [442]

Cross-Examination

Q. In 1940, was it your custom to be in railroad camp sometime during the day each day? [447]

A. Yes, sir.

Q. And generally, would you stop at railroad camp at night, after the work was done and before going home?

A. Yes, sir; I stopped there at any time of the day and at all hours of the day and night.

Q. Part of your duties as superintendent was to oversee the operation of the railroad, is that right?

A. Yes, sir.

Q. And generally, while you were at railroad camp, you would confer with Mr. Groseclose, would you not?

A. Not always, but——

(Testimony of Bennett Ellingson.)

Q. Generally speaking?

A. Generally speaking, if I didn't have things lined up with him, where something came up in the meantime, I would talk with him.

Q. You would do that to learn about the train movements, the loads that had been hauled, and plans where movements were to take place the next day? [448]

A. As a rule, I know every day just what is going to happen the next day,—in the evening.

Q. (Mr. Walker, continuing): Do you discuss your knowledge of what has taken place every day with Mr. Groseclose in conferring with him every day?

A. We usually talk things over every day, at sometime during the day.

Q. At the conclusion of the day's work on May 20th, you stopped to see Mr. Groseclose, did you not? A. No doubt I did.

Q. And you talked with him that evening about the train movements of the next day, didn't you?

A. I usually do.

Q. You knew and told him about where the loads were to be hauled from that next day?

A. As a rule, we talk those things over.

Q. And you knew what engines were going to be put in service the next day?

A. Quite,—I usually do.

Q. You knew what time the train movements were to begin the next day?

(Testimony of Bennett Ellingson.)

A. I have a pretty close idea,—we are both in pretty close [449] touch on them.

Q. You also knew who would make up the train crews the next day?

A. Sometimes we work together on it, and sometimes we don't.

Q. But at any rate, that night of May 20, you knew who would make up the train crews of the next day, didn't you?

A. I imagine that I did. I have a close idea.

Q. You knew that night that Mr. Lytle and Mr. Reece would be on No. 18 leaving the yards at 5:30 the next morning, didn't you?

A. There is a chance that I did, and a chance that I didn't.

Q. And that is the reason that you were at Crossing No. 1 when the train went by, wasn't it?

A. No, sir.

Q. You deliberately set out to catch Mr. Lytle and Mr. Reece in a violation, didn't you?

A. No, sir.

Q. (Mr. Walker, continuing): Did you see anyone at railroad camp the morning of May 21, before you left in your car?

A. I think that I seen the trainmaster about his work there that morning. [450]

Q. Where did you see him?

A. Well, he was around the yards there, probably in and out of the office.

Q. In the office also, didn't you?

(Testimony of Bennett Ellingson.)

A. I don't remember personally seeing him particularly in the office, exactly, but he was around the camp there.

Q. What time did you arrive at Railroad Camp that morning?

A. I don't remember exactly, but it must have been around five o'clock.

Q. Was engine No. 18 still in the yards?

A. I don't remember for sure whether it had left yet or not.

Q. How long did you stay at railroad camp?

A. Oh, I was probably around there a few minutes.

Q. And then how long was it before you returned to railroad camp from Crossing No. 1?

A. I was back there shortly after breakfast, I believe.

Q. That would be about 5:30?

A. No—no, breakfast at 6:10.

Q. Where did you go from Crossing No. 1?

A. Back to the railroad camp.

Q. Straight back there? A. Yes, sir.

Q. And after you left railroad camp, did you go straight to Crossing No. 1?

A. I did. [451]

Q. Now, you talked to Mr. Lytle about the Stevens Creek runaway? A. Yes, sir.

The Reporter: Runaway, yes, sir.

Q. (Mr. Walker, continuing): Is what is

(Testimony of Bennett Ellingson.)

called Stevens Creek also sometimes called the camp at No. 4 Junction?

A. We have a No. 4 Junction.

Q. Well, is Stevens Creek——

A. (Interposing) Stevens Creek winds up through that country.

Q. And is there a grade from Stevens Creek downhill? A. Yes, sir.

Q. In the direction in which the loads would be moving?

A. From Number 4 Junction down through the Stevens Creek country.

Q. At the bottom of the grade, is there a water tank there? A. Yes, sir.

Q. Called the Humptulips Water Tank?

A. Yes, sir. [452]

Mr. Reporter, would you please mark this map as Board's Exhibit No. 12?

It is stipulated by and between the parties hereto that beginning with line 17 on page 49 of the official transcript through line 1 on page 54 of the official transcript in case No. XIX R 538 and XIX R 539, may be physically incorporated in this record for the purpose of receiving the exhibit marked Respondent's Exhibit No. 1 in that proceeding without further identification in this proceeding.

Mr. Maxwell: I so stipulate, and reserving my right to object to the exhibit on other grounds than improper identification.

(Testimony of Bennett Ellingson.)

(Matter covered in above stipulation follows herewith:

“Mr. Maxwell: We offer for identification Company’s Exhibit No. 1.

“(Thereupon a document hereinabove referred to was marked for identification as Company’s Exhibit No. 1.)

“Q. (Mr. Maxwell, continuing): Showing you Company’s Exhibit No. 1, I will ask you what that is? [453]

“A. That is a map showing the territory in which the Company operates, and the location of the camps and railroads.

“Mr. Maxwell: Is there any objection to this exhibit? We are offering it at this time.

“Mr. Stevens: Just a minute. May we go off the record?

“Trial Examiner Walker: Off the record.

“(There was a discussion off the record.)

“Q. (Mr. Maxwell): Do you know who made this map? A. I do not.

“Q. Is it a county map or a copy of one?

“A. I believe it is a copy of a county map; it is one that has been used by the company for some time.

“Q. Is that map to scale, do you know?

“A. Those squares or sections are one mile square; the larger ones are six miles square—townships.

“Q. It is an inch to the mile, is it not?

(Testimony of Bennett Ellingson.)

“A. Yes, it is an inch to the mile.

“Mr. Stevens: We have no objection.

“Mr. Maxwell: We will offer the map.

“Mr. Molthan: We have no objection.

“Trial Examiner Walker: Company’s Exhibit 1 is hereby received.

“(Whereupon, the document hereinabove marked as Company’s Exhibit 1 for identification was received in evidence as Company’s Exhibit No. 1.) [454]

“Q. (Mr. Maxwell): Mr. Polson, I will ask you whether or not this map covers the territory in which the Polson Logging Company and the Ozette Railway Company are logging at the present time? A. Yes, it does.

“Q. Does this map show the railway trackage of the company—the Polson Logging Company?

“A. It shows the general location of the main line and the branches; it does not show all the logging spurs.

“Q. Does it show the trackage of the Ozette Railway Company? A. Yes.

“Q. Will you point out to us the railway trackage of the Polson Logging Company as indicated on this map?

“A. The trackage of the Polson Logging Company?

“Q. Starting from Hoquiam, and indicating for us. Suppose we start at Hoquiam.

(Testimony of Bennett Ellingson.)

“A. It starts up here about a mile and a half from the Hoquiam City Limits (indicating) on this side of the river from the highway.

“Q. Is this starting point indicated in any way on the map?

“A. It is indicated by the green line on which ‘Polson Logging Company’ is shown.

“Q. And this map has a little sticker there with an arrow; is that the starting point of the logging track?

“A. Yes, that is the starting point of the railroad. [455]

“Q. In which direction does the trackage run from the log dump?

“A. In a northerly direction.

“Q. To what point?

“A. It goes northerly until we hit the Headquarters camp, or the railway camp.

“Q. How is the Headquarters or railway camp indicated on the map?

“A. It is indicated by a sticker marked ‘RR’.

“Q. How is this trackage shown on the map from the log dump to the Headquarters camp?

“A. By a green line.

“Q. Approximately what is the distance from the log dump to the railway camp?

“A. I think that it is approximately 15 miles; I am not sure as to the distance.

(Testimony of Bennett Ellingson.)

“Mr. Stevens: Doesn’t the scale show it?”

“Mr. Maxwell: Not necessarily, because it goes up through a rough country.

“Mr. Donley: I think he has a memorandum that will refresh his recollection on that.

“The Witness: If I have it here. 12 miles.

“Q. (Mr. Maxwell): Approximately 12 miles?”

“A. From the landing to the railroad camp.

“Q. How is this line from the log dump to the railroad camp [456] indicated? Is it indicated by the general term ‘main line’ or by what classification?”

“A. It is generally referred to as the lower end—a part of the main line.

“Q. Does the main line extend beyond the railroad camp or headquarters camp?”

“A. Yes. It could be considered as extending to as far as the start of the Ozette line.

“Q. In which direction does it run from headquarters camp?”

“A. Generally, north.

“Q. Will you indicate on the map from camp headquarters or railroad camp the track-age on up the main line?”

“A. You mean this green line here (indicating)?”

“Q. Yes.

“A. It goes up here (indicating).

“Q. Where does the green line go?”

(Testimony of Bennett Ellingson.)

“A. To what is generally referred to as Cook Creek.

“Q. Is there any indication on this map showing the end of this main line?

“A. There is nothing to indicate except it is the end of the green line, indicating the end of Polson Logging Company road and the start of the red line, indicating the start of the Ozette Railway Company line.

“Q. Is that Cook Creek?

“A. Yes. [457]

“Q. Will you write on there ‘Cook Creek’?

“A. Yes. (Writes on map.)

“Q. Is that the end of the Polson Company’s main line?

“A. Yes, it is.”) [458-59]

Mr. Maxwell: May I have an exception?

Trial Examiner Kent: Yes.

Mr. Walker: At this time I offer in evidence that certain exhibit described in the foregoing stipulation and which is marked as Company’s Exhibit No. 1.

Trial Examiner Kent: In the prior case?

Mr. Walker: In the prior case. [460]

Mr. Maxwell: I will object to the introduction of the map on the ground that it has no relevancy to any issue herein involved, and that it is wholly immaterial.

Trial Examiner Kent: It may be admitted.

(Testimony of Bennett Ellingson.)

(Whereupon the document heretofore marked for identification as Board's Exhibit 12, was received in evidence.) [461]

Q. Now, proceeding northward on the map, is the double line which moves out from Hoquiam past what is designated as Railroad Camp, the course of the highway?

A. Well, it is right along in that line.

Q. Where on the map is the Axford Prairie Crossing?

Mr. Maxwell: Indicate it by another "X."

A. Well, this would be right here.

Trial Examiner Kent: Make a circle, and that will make it easier to find. You have already got one cross there.

Mr. Maxwell: A circle.

Trial Examiner Kent: And write in "Axford Crossing" there.

(Witness drawing a circle on the map.)

Mr. Maxwell: Have you got a red pencil there? That will show up better.

And write in "Axford Crossing."

(Whereupon Mr. Walker writes in the words "Axford Prairie Crossing" beside the hereinabove mentioned circle.)

Q. (Mr. Walker, continuing): Axford Prairie Crossing is that part immediately to the right of the circle in red pencil [463] which you have drawn on the map?

(Testimony of Bennett Ellingson.)

A. It is right there close. That circle is just a trifle ahead of where the highway crosses the track. I could put that crossing right on it.

Q. Well, that is all right. Now, is there a road which branches off the highway at the point where Axford Prairie Crossing is, running parallel with the track in a westerly direction?

A. Yes, sir.

Mr. Maxwell: I will object to this as improper cross examination, as being totally immaterial and irrelevant, and as having no bearing on any issue herein, and I object to the form of the question.

Trial Examiner Kent: What is the purpose, Mr. Walker?

Mr. Walker: I will drop that at the moment. I will withdraw that question.

Q. (Mr. Walker, continuing): Now, Mr. Ellingson, going back to the incident of the runaway, at Mr. Lytle's house you told him that he was to be off for a couple of days because of the runaway?

A. Yes.

Q. And you did keep him off for a couple of days? [464]

A. I don't know as I can remember how many days, but it was a few days.

Q. And when did that suspension begin—immediately?

A. Yes, I think that it did.

Q. He didn't work the next day, then?

A. I couldn't say for sure on that, whether he worked the next day or not.

(Testimony of Bennett Ellingson.)

Q. Or the following day—two days after the runaway?

Mr. Maxwell: I submit that the question has been answered. The witness says that he doesn't have a definite recollection.

Q. (Mr. Walker, continuing): You made the assertion on direct examination that he was suspended.

Now, what is your recollection about it?

A. He was suspended.

Q. For two days?

A. I wouldn't say exactly two days.

Q. Well, was it three days?

A. I wouldn't say for sure, exactly.

Q. And the suspension began immediately after you told him about it?

A. I wouldn't say for sure.

Q. Now, when in April was this?

A. I don't remember the exact date.

Q. Well, about when?

A. Around the first of April, right close to the first.

Q. Somewhere in the first week of April, is that right? [465]

A. Well, somewheres in the first, there, yes.

[466]

Mr. Maxwell: We will get the company records, if you wish.

Q. (Mr. Walker, continuing) Now, what is your best recollection at this time as to the length of time that Mr. Lytle was suspended?

(Testimony of Bennett Ellingson.)

A. How long was he suspended?

Q. Yes.

A. I don't remember the exact days.

Q. I didn't ask you the exact dates. I asked you how long was he suspended? [467]

A. Well, I don't remember for sure.

Q. Well, was it one day or two days?

A. I don't remember.

Q. You are the one that invoked the suspension, aren't you? A. Yes.

Q. And you are the one that told about it?

A. Yes, sir.

Q. And you are the one that kept them off the job? A. Yes, sir.

Q. And you are the one that told Mr. Groschlose not to put them back until you told him to, isn't that right?

A. Right close to being correct.

Q. Who would know better how long he was off than you?

A. It is on record somewheres.

Q. You have got the record on it, have you?

A. I imagine that it could be looked up somewhere.

Q. Will you do that?

Mr. Maxwell: We will be glad to. [468]

Q. (Mr. Walker, continuing) That night at the house you told Mr. Lytle not to forget the safety rules, and especially rules concerning crossings, is that correct? A. Yes, sir.

(Testimony of Bennett Ellingson.)

Q. (Mr. Walker, continuing) Did you have any reason for warning [471] him about crossings at that time? A. Yes, sir.

Q. What? A. Slow about acting.

Q. What was that?

A. Slow on getting out, taking his time.

Q. Explain that further.

A. Slow on getting out to flag these crossings.

Q. When did you first observe that?

A. When?

Q. Yes?

A. I watched those crossings regularly.

Q. When did you first observe that?

A. Oh, I imagine it was—it wasn't very long before I had warned him several times on——

Q. (Interposing) Before what?

A. What is your question? [472]

Mr. Walker: Not very long before what?

Mr. Maxwell: What date?

The Witness: Before the date?

Q. (Mr. Walker, continuing) Yes.

A. I had warned Lytle several times about different things and especially crossings.

Q. When did you first warn him about crossings?

A. Well, I couldn't remember the exact date, but it would probably be around three or four years ago, when I first took over this thing. I warned every man.

Q. And what did you say at that time?

(Testimony of Bennett Ellingson.)

A. The same as I told them all, that safety was one of the main things in that railroad.

Q. Is that all you told them at that time?

A. No, sir.

Q. What else did you tell them at that time?

A. The same as I told them all.

Q. What? A. Safety.

Q. Anything else? A. No speeding.

Q. Anything else?

A. Blowing whistles,—slowing down through camps.

Q. What else? [473]

A. Careful over crossings.

Q. That is in sum and substance what you told all of them? A. Yes, sir.

Q. Shortly after you went to work there?

A. When I went to work.

Q. Now, when was the next time that you warned Mr. Lytle?

A. I couldn't remember the exact date.

Q. Well, how long after the first time?

A. I couldn't remember the exact date. I have rode with Lytle several times,—I have probably never rode with him but what something was brought up about safety.

Q. How many times during the time that Mr. Lytle has worked there had you warned him?

A. On what?

Q. About safety?

A. Well, I didn't warn him every day. That is a cinch. But I talked safety.

(Testimony of Bennett Ellingson.)

Q. Just what do you mean by "you talked safety"?

Mr. Maxwell: Well, now, I will object to the form of the question. The matter has been thoroughly gone into by counsel.

Trial Examiner Kent: Reframe the question.

Q. (Mr. Walker, continuing) Under the heading of "safety", what did you discuss with the men?

A. To be careful.

Q. Is that all? [474]

A. To be careful all the way through for the safety of other men.

Q. And that is the sum and substance of it?

A. No.

Q. Well, what else?

A. Well, like I explained,—about slowing down through camps, blowing whistles, careful on trestles, slowing down on trestles and bridges, never letting the train get out of control; to run slow enough so that the trains can be under control at all times; to flag crossings.

Q. (Mr. Walker, continuing) Have you ever at any time before May 21, 1940, observed when the crummy was being pushed by the locomotive without a brakeman being on the crummy in full sight of the engineer at all times? [475]

A. On crossings it is very important and compulsory that they be out on the front of this crummy. When they are travelling along on the main line, and there are no crossings, as a rule they

(Testimony of Bennett Ellingson.)

stay in the crummy and look out through the door or the window. If it is a nice day, you will see them standing out on the crummy.

Q. (Mr. Walker, continuing) Then you have at times before May 21, 1940, when the crummy is being pushed ahead of the locomotive, observed a brakeman being out on the crummy without being in full sight of the engineer at all times, is that right?

A. When they are travelling along on the main line; not when they are going across crossings.

When they are no crossings, they are out there—up until this morning. [476]

Q. (Mr. Walker, continuing) Have you ever discharged a brakeman from any of those braking crews prior to May 21, 1940, for not being on the crummy, in full sight of the engineer, when the crummy is being pushed ahead of the locomotive?

A. On a crossing?

Q. Any place.

A. No, there is no one let out for that reason.

Q. Before May 21, 1940, had you ever observed any brakemen who failed to be on the crummy in view of the engineer when the crummy was being shoved across a crossing?

A. If they hadn't of been out there, they would have been in the same fix as these two fellows were,—if they hadn't have been out on the front of that crummy.

Q. Do you mean that you had never before ob-

(Testimony of Bennett Ellingson.)

served any brakeman not being out on the crummy in full sight of the engineer when the crummy is being pushed across a crossing?

A. I will say that one of them is always out there. [477]

Q. (Mr. Walker, continuing) Does this refresh your recollection: that in late 1938 or early 1939, you had parked your car up the side road which extends westerly off crossing No. 1. While your car was parked there, a locomotive pushing the crummy ahead of it, crossed Crossing No. 1 at approximately 50 miles an hour, and when you flagged it down, the train skidded [478] to a stop in about 90 feet opposite your car, at which time Mr. Groves stood out on the engine gangway and asked you what you wanted?

A. No, sir; if I had of caught something like that going on, Groves wouldn't have been up there today.

Q. Before May 21st, had you ever ridden in the crummy with any of the brake crew?

A. Many times.

Q. And have you ever been in the crummy with the brake crew,—when I say “in the crummy”, I mean in the enclosure, the dog house?

A. I see.

Q. All right. Had you ever been in the dog house on the crummy with the brake crew as the crummy was being pushed across the crossing?

A. I can't say that I was ever in the crummy on any of those crossings,—stayed in the crummy when

(Testimony of Bennett Ellingson.)

that engine went over [479] the crossing? I thought too much of my own hide, outside of the public.

Q. (Mr. Walker, continuing) Have any of the brakeman, while you were riding on the crummy with them, stayed in the dog house while the crummy was being pushed across the crossing?

A. One of them was always out there.

Q. You would have fired the brake crew then, if such had taken place, would you?

A. I certainly would, if they had of both stayed in that crummy.

Q. At that time? A. Yes, sir.

Q. Did you have a talk with any of the trainmen the next or the second day following May 21st, asking them where the brakemen were supposed to be standing when the crummy is being shoved across a crossing? A. I might have.

Q. Do you recall having such a talk with Mr. Thomas?

A. I might have talked with him. I talked many times with him on those crossings.

Q. Do you recall having talked with Mr. Williams about it? A. I might have.

Q. Do you recall having talked to Mr. Price about it? A. No doubt I did.

Q. Do you recall talking to Mr. Key about it? [480]

A. I have talked with them all on those crossings.

Q. Including Earl Wood?

(Testimony of Bennett Ellingson.)

A. I have talked with them all on those crossings—either whistles or flaggings.

Q. Do you recall talking with Mr. Earl Wood, the next day or the second day following May 21st?

A. I don't remember any certain dates, but I have talked with him plenty.

Q. Now, that time after Mr. Stearns was killed, you told Mr. Lytle not to stop and flag the crossings because the train had stopped for Mr. Lytle to catch up after the engine had cleared the train from the crossing, is that right?

A. I don't remember any certain date that I told Mr. Lytle this, to give him this particular order.

Q. (Mr. Walker, continuing) Well, you remember the incident, [481] to you?

A. Yes, I remember that.

Q. Do you recall that that was crossing No. 3?

A. No. 5. I believe.

Q. What is your recollection on that?

A. Do you want the particulars of the accident?

Trial Examiner Kent: No. Your preceding answer was that you believe it was No. 5. The pending question is, is that your best recollection?

The Witness: Yes, No. 5, if I remember right

Q. (Mr. Walker, continuing) Now, at that time, the crummy was pushed ahead of the train, Mr. Lytle dropped off to flag the crossing as the train went over the crossing, is that right?

A. I wasn't there at that accident.

Q. What is that? [482]

(Testimony of Bennett Ellingson.)

A. I wasn't there at the time of that accident. [483]

Q. (Mr. Walker, continuing) Now, Mr. Ellingson, I am calling your attention to an incident which occurred at, as you say, No. 5 Crossing—in which, as Mr. Lytle testified, you told him not to flag the crossing any more. Well, have you got that incident in mind?

A. That I told him not to flag the crossing?

Q. Have you got that incident in mind?

A. Yes.

Q. All right. Now, at that time, while the crummy was being pushed ahead of the train, Mr. Lytle had dropped off to flag the crossing as the train went over the crossing, is that [485] correct?

A. One of the brakemen jumped off.

Q. Well, it was Mr. Lytle, wasn't it?

A. Well, it might have been—it might have been either one of them, whoever it was that was with him or any other brakeman.

Q. After the train had cleared the crossing, the train then stopped, didn't it?

A. Sometimes they did and sometimes they kept on moving.

Q. Now, wait a minute. We are talking about one single incident. That incident that occurred as you say at No. 5 crossing, where, as Mr. Lytle testified, you told him not to flag the crossings any more. Have you got that in mind now? A. Yes.

Q. All right. Now, after the train cleared the crossing, the train stopped, didn't it?

(Testimony of Bennett Ellingson.)

A. Not always.

Q. Didn't that particular train at that particular time stop after it had cleared the crossing?

A. No, they didn't?

Q. All right. A. Not always.

Q. Do you understand my question?

A. Yes, sir; I think that I do.

Q. At that particular time, did that particular train, after [486] it had cleared that particular crossing, stop and wait for Mr. Lytle to catch up with the train again?

A. When they were pulling these empties out? There is no particular night that I can recall that this thing—that that change took place.

Q. (Mr. Walker, continuing) When did you have this conversation with Mr. Lytle?

A. It might have been when we were riding on a train or at a railroad camp, or anywhere else.

Q. What fixes it in your mind that you told him that?

A. We talked it over. I talked it over with several of them, the [487] same as anything else that comes up.

Q. Did you tell the train crew generally the same thing as you told Mr. Lytle?

A. It was generally the same.

Q. Now, isn't it a fact that that conversation with Mr. Lytle occurred in the cab of the engine No. 90 after the train had crossed the crossing, and that the entire crew, including yourself, were riding in the cab of the engine?

(Testimony of Bennett Ellingson.)

A. It wouldn't have been possible for all of us to have been riding in the cab over a crossing.

Q. Well, was it or wasn't that a fact?

A. It was not a fact—that they were always in the cab over those crossings, pushing that crummy.

Q. And did that general change in regulations take place about a month or two after Mr. Stearns was killed?

A. I couldn't recall the dates.

Q. Well, generally, is that about right?

A. Well, now, I really don't know.

Q. What is your best recollection?

A. I really don't know exactly when it took place.

Q. Does that sound about right?

A. Well, I couldn't give you any exact dates on it, because those things take place every day—changes in this and that. You can't recall those dates right down to a day or even a month from the date, as a rule. [488]

Q. You mean that there have been changes made in the regulations?

A. Not in regulations, but those things come up in railroading, just like that came up. Those little things come up.

Q. By changes, you mean countermanding orders that you have previously given?

A. It might not be previous orders, but it might be any little thing where we talk things over about doing such a thing.

(Testimony of Bennett Ellingson.)

Q. On the morning of May 21st, did you go from railroad camp to Crossing No. 1 for the express purpose of finding out if the crossing was being watched by one of the brakemen out on the crummy?

A. As I told you before, I was on my way to Quinault.

The Witness: I never follow a train to any of those crossings, but what I don't see that orders are obeyed.

Q. (Mr. Walker, continuing) That morning of May 21st, did you go from Railroad Camp to Crossing No. 1 for the express purpose of seeing if one of the brakemen were out? A. No, sir.

Q. On the crummy, as the train crossed the crossing? [489] A. No, I didn't.

Q. Then why did you go immediately right back to railroad camp?

A. What else would I do—when anyone pulls a stunt like that?

Q. Why did you go directly back to Railroad Camp?

A. To correct that thing immediately.

Q. And that is what you went out for that morning, isn't it? A. No, sir. [490]

FRANK LANDI,

called as witness by and on behalf of the Respondent.

Direct Examination

Q. (Mr. Maxwell) Will you state your name, Mr. Landi? A. Frank Landi.

Q. Where are you employed?

A. Polson Logging Company.

Q. Were you employed at the Polson Logging Company in 1940?

A. In 1940? Let's see,—it was the first of March, but I don't remember exactly now the dates. We can find out pretty easy.

Q. What is your job with the Polson Logging Company? A. Section foreman.

Q. Do you recall an incident in which the company experienced two wrecks in one day?

A. Yes.

Q. Do you recall seeing Mr. Ellingson on that day?

A. Yes, yes. He came after the first one—after the second [491] one.

Q. Where were you when you saw Mr. Ellingson? A. I was on the track, by the wreck.

Q. Were you and Mr. Ellingson riding on a flat car at any time?

A. We did, after we found out that there was another wreck ahead of us.

Q. Do you recall having a conversation with Mr. Ellingson at that time?

(Testimony of Frank Landi.)

A. No, I haven't—the only thing that I know, I was really thinking it might be my fault they had so many wrecks, because I had the responsibility over the tracks, but I never had any other conversations that I know.

Q. Do you recall Mr. Ellingson saying,—and I am quoting from page 234 of the official transcript:

“One of them fellows in down here now.”

And further, on page 235:

“they were bucking”?

A. No, I never recall anything like that.

Q. Do you recall Mr. Ellingson saying, and I am quoting from page 237 of the official transcript:

“It looks like they are bucking.” “Some day somebody,—some day they will all be going down the road.”

A. No, I don't.

Q. Do you recall Mr. Ellingson saying anything about the train [492] men and engine men going into the Brotherhoods? A. No.

Q. Do you recall Mr. Ellingson saying, “One of them was leading them into it”?

A. No, I don't recall that.

Q. Do you recall Mr. Ellingson saying, and I am quoting from page 241 of the transcript,

“‘In this here Union’,—he says,—and he says there is one of them down,—he says, ‘There is one of them down there now.’”

Do you recall that?

A. No, I don't.

(Testimony of Frank Landi.)

Q. Do you recall him saying "It looks like he is leading the men astray"?

A. I don't recall that.

Q. On that day, did you have any discussion with Mr. Ellingson at all about the Brotherhood or any other union? A. No, I don't.

Q. Have you ever discussed the Brotherhood with Mr. Ellingson? A. I haven't.

Q. Has Mr. Ellingson ever discussed it with you? A. No. [493]

Q. At that time, there was a rumor going around that the Northern Pacific was going to take over the Polson Line, is that right? [494]

A. No, I didn't really pay any attention to what was going on along that line.

Q. (Mr. Walter, continuing) You didn't hear about a big railroad going to take over the Polson line? A. No, I didn't.

Q. But from what you heard, you thought that the railroad men on the Polson Line were going into the big railroads?

A. Well, I couldn't tell you, because I never had it in my mind that I heard anything like that.

Q. But something like that?

A. No, I couldn't tell you that it was even something like that.

Q. Well, what was it that you heard about the big railroads?

A. I didn't hear nothing about the big railroads.

Q. Oh, you didn't? A. No.

(Testimony of Frank Landi.)

Q. Was anyone else on that car at the time you and Mr. Ellingson were riding on it?

A. I do believe,—because there are so many different brakemen, sometimes,—I haven't learned them all yet,—but I believe it was a fellow by the name of Nelson,—I don't know the last name. [495]

Q. Does it refresh your recollection that his name is Nels Hill?

A. I believe it is, yes; that is what I heard about it.

R. R. GOLICK

called as a witness on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Will you state your name for the record, please? A. R. R. Golick (spelling).

Q. Where are you employed?

A. Polson Logging Company.

Q. Were you employed by the Polson Logging Company in 1936? [496] A. Yes.

Q. In what capacity were you employed in 1936?

A. Timekeeper, and I also covered in cases of emergency, in the absence of the foreman, such tasks as bookkeeping matters, and if they were beyond my authority, to inform the proper authorities.

(Testimony of R. R. Golick.)

Anyway, it was my obligation to see that things were going right.

Q. Where were you stationed at that time?

A. Polson's railroad camp. That was after the 28th of March, 1936,—June.

Mr. Maxwell: Let me have Respondent's 1.

Q. (Mr. Maxwell, continuing): Handing you Respondent's Exhibit No. 1, I will ask you if you know what that is? A. Yes, I do.

Q. Will you state what it is?

A. As the heading implies, logging safety standards, covering railroads in general logging camps as outlined by the state.

Q. When did you first see that?

A. I do not recall the exact date. However, it was during my stay there at railroad camp.

Q. What did you do with the respondent's Exhibit No. 1?

A. Well, that exhibit,—yes, the exhibit—that came up shortly after an accident had occurred there at the No. 5 Crossing. It was during a time or a period when the Polson [497] Logging Company was putting on a campaign to cut down the accidents, and stressing proper care in railroad procedure, which covered of course everything with-in common sense, covering the railroad and its care.

Q. (Mr. Maxwell, continuing): Did you receive at Railroad Camp a number of copies of Respondent's Exhibit No. 1? A. Yes, I did.

Q. (Mr. Maxwell, continuing): Where, if you

(Testimony of R. R. Golick.)

know, did Respondent's Exhibit No. 1 come from, into your possession?

A. It came from the main office apparently from the safety engineer.

Q. How many copies did you receive?

A. I do not recall the exact number, but a stack about that high (indicating).

Q. Can you estimate the number? [498]

A. Oh, it must have been about between 20 and 30.

Q. And what was done with those copies?

A. They were placed where everyone that wanted to could get them, and a sign placed over them, "Take one and use it" and we tried to make it a special point to get one to each locomotive and every machine.

Mr. Walker: I move that that be stricken.

Trial Examiner Kent: It may be stricken.

Q. (Mr. Maxwell, continuing): What did you do with these copies?

A. We placed them out where everyone could get them that wanted to, and placed a sign over them, "Take one and use it".

Q. (Mr. Maxwell, continuing): Did you pass these copies out to any of the employees?

A. Yes.

Q. What classes of employees were they given to?

A. We placed special emphasis on machines, donkeys, locomotives, any place where emergency

(Testimony of R. R. Golick.)

signals would be necessary in case of an emergency or otherwise.

Q. Were they given to trainmen? A. Yes.
[499]

Q. In your capacity, were you familiar with regulations or rules of the company regarding the flagging of highway crossings?

A. Yes,—more or less; perhaps not entirely.

Q. I will ask you where you were living in 1937 and 1938.

A. Part of that time I was staying at my folks' place, close to the crossing.

Q. (Mr. Maxwell, continuing): Which crossing? A. Crossing No. 1.

Q. Is that crossing designated by any other name?

A. The crossing at Axford Prairie.

Q. Have you observed trains crossing at the crossing? A. Yes.

Q. What was done by the trainmen when the trains crossed the crossing? [500]

Mr. Maxwell: You may answer.

A. The brakemen generally, in fact every time I saw it, would stand out on the crummy, with the train either at a kind of a dead stop, or proceeding under control. The brakeman would stand [501] out as near the end as practicable and look for traffic on the highway, and signal the engineer accordingly.

(Testimony of R. R. Golick.)

Mr. Maxwell: Your witness. Oh, one more question.

Q. (Mr. Maxwell, continuing): Were copies of Respondent's Exhibit No. 1 given to trainmen by you? A. Yes.

Mr. Maxwell: Your witness.

Cross Examination

By Mr. Walker:

Q. What do you mean, the trainmen signalled the engineer correspondingly?

A. Accordingly.

Q. All right. Accordingly.

A. If he saw fit to proceed, he would give the signal to go ahead. If not——

Q. (Interposing): How would he give that signal? What else?

A. That is all. What else do you mean?

Q. I am asking you to explain what you mean by "give the signal accordingly"?

A. Just that.

Mr. Maxwell: Let the record show that the witness waved his arm with a forward motion.

Q. (Mr. Walker, continuing): That is the only signal that you have seen the brakemen give the engineers?

A. Yes, that is right. There is no occasion to give any other.

Q. Now, what do you mean that the brakeman would stand on the [502] crummy and the train would either stop or the train would approach under control?

(Testimony of R. R. Golick.)

A. It would either stop at the crossing, or approach under control,—under control,—at a speed at which he could stop in the event of an emergency on the crossing, so that he could stop before bumping into anything on the crossing.

Q. (Mr. Walker, continuing): What speed did you observe was a speed under control?

A. Do you want that in miles? I think you can guess it just as well as I can.

Q. Let's have your guess, then.

A. Well, that speed would be reduced as they approached the crossing.

Q. At what speed?

A. Just fast enough to stop in the event there was anything there on the crossing.

Q. What is your guess as to miles?

A. Well, if there was something on the crossing, it would be nil.

Q. Go ahead. What if there wasn't?

A. Well, perhaps five or maybe ten. [503]

Q. (Mr. Walker, continuing): What trainman did you give respondent's exhibit 1 to?

A. I tried to cover all of them.

Q. Did you?

A. Yes, I made a special point to try to get every one, and had that sign there, "Take one and use it".

Q. Now, do you mean brakemen?

A. Each locomotive.

Q. Did you give a copy of respondent's Exhibit 1 to each one of the brakemen?

(Testimony of R. R. Golick.)

A. Each locomotive, which was accessible to the brakemen or by the brakemen.

Q. Did you give a copy of respondent's exhibit 1 to each one of the brakemen? A. No.

Q. Did you give a copy of respondent's exhibit 1 to each one of the engineers? A. No. [504]

Q. (Mr. Walker, continuing): Where was your home with respect to crossing No. 1?

A. About 300 yards from the crossing,—about.

Q. And did you stand outside the house or inside of the house?

A. It all depends upon what I was doing at the time. I lived inside of the house.

Q. And there were times when you observed this from inside of the house? A. Yes.

Q. Will you mark on what has been identified as Respondent's Exhibit 1 in the previous proceeding—Company's Exhibit 1 in the previous proceeding, with this pen, where your house was situated?

Mr. Maxwell: Point out to him Axford Prairie Crossing on that big map.

The Witness: Right there (indicating).

Here is Railroad Camp here, and here is the crossing there (indicating). Do you want me to make a cross there?

Mr. Walker: Yes. [506]

Mr. Maxwell: Where your house is, approximately.

(Thereupon the witness marks on the map.)

(Testimony of R. R. Golick.)

(Mr. Walker marks a cross at the point indicated and wrote "Golick house" on the map.)

Q. (Mr. Walker, continuing): There has now been marked on the map with a pen, an "X" opposite which there is the description "Golick house". Is that correct? A. That is right.

Q. Now, what brakemen did you see out on the crummy these times when you observed the crossing?

A. I do not recall any particular man, but it would be any brakeman that worked on the Polson line. I cannot recall any incident which would renew my memory on that as to those that I had seen. [507]

Q. At any time you were observing Crossing No. 1, had you observed any brakemen failing to be out on the crummy in full view of the engineer when the crummy was being shoved across the crossing? [510] A. Yes.

Q. Who?

A. But that was sometime ago. I think that was prior to the dates which are under discussion.

Q. You mean prior to what?

A. The dates under discussion.

Q. Well, what dates are you discussing?

A. The same ones you are, I think. Let's see,—oh, the former part of '36. [511]

GEORGE GROSECLOSE

called as a witness by and on behalf of Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Will you state your name for the record, please? A. George Groseclose.

Q. Where are you employed, Mr. Groseclose?

A. Polson Logging Company.

Q. In what capacity are you presently employed?

A. Trainmaster.

Q. How long have you been employed in that capacity? A. Since October, 1939. [512]

Q. Prior to October, 1939, were you employed by the Polson Logging Company? A. Yes.

Q. In what capacities were you employed?

A. As a brakeman.

Q. And during what period were you employed as a brakeman? A. From 1932 to 1939.

Q. I will ask you whether or not the company had any rules or regulations regarding the flagging of highway crossings? A. Yes, they did.

Q. Were those rules in effect on the 21st of May, 1940? A. Yes.

Q. How long prior to that time had they been in effect?

A. I couldn't say. They were in effect when I went to work there.

Q. Did anyone instruct you as to the rule of flagging the crossing?

(Testimony of George Groseclose.)

A. Yes; the Trainmaster.

Q. And who was that?

A. Billy Gordon; William Gordon, you might say; that was his right name.

Q. In your capacity as trainmaster, have you instructed trainmen regarding the flagging of crossings? A. Yes.

Q. Do you know Mr. Dave Lytle? [513]

A. Yes, I know him.

Q. I will ask whether or not you have given those instructions to Mr. Lytle?

A. Yes, I have.

Q. Prior to May 21, 1940, had you given that instruction to Mr. Lytle?

A. Will you give me that question again, please?

Q. Prior to May 21st, 1940, had you given that instruction to Mr. Lytle regarding the flagging of crossings? A. Yes.

Q. How long prior to May 21, 1940, and immediately preceding that date, had you instructed Mr. Lytle regarding the flagging of crossings?

A. About two weeks before he was discharged,—during, just shortly after the time he had the run-away.

Q. Will you state what was said at that time and where the conversation took place?

A. As I remember it, the engine was taking oil, and Dave Lytle came across the track there to see where he was to tie the engine up. I couldn't recall just how the conversation came up, but he said

(Testimony of George Groseclose.)

that Bennett gave him hell about a runaway and also about flagging the crossings; and I told him that that was the rule, and if Bennett wanted the crossings flagged, that he had better do—that he had better flag them. That was about two weeks, to the best of my knowledge, before [514] he was discharged.

Q. Had you instructed other brakemen regarding the flagging of crossings? A. Yes, I had.

Q. I will ask you what the company rule required regarding the flagging of crossings?

A. The company rule was that you proceed up to a crossing under control. When I say “under control”, I mean about three miles an hour, and if a crossing was clear, if there was no cars coming, to flag the engine across the crossing. If there was a car coming, we stopped and the car went across the crossing first.

Q. Where was the brakeman when this flagging was done?

A. He was out about five feet in the highway on the side next to the engineer.

Q. Would that be the front end of the crummy?

A. That would be the front end of it.

Q. Assuming that the engine was pushing the crummy and a string of empties ahead of it, what was the rule regarding the flagging of crossings?

A. Stop and flag the crossings.

Q. What was done by the trainman?

A. He had a red flag. He walked on the high-

(Testimony of George Groseclose.)

way, ahead of the empties; he looked up the highway both ways and if there was no cars coming, he flagged the engine on across the [515] crossing.

Q. In the event the head brakeman did not go out to flag, what was the requirement regarding flagging by the second brakeman?

A. One of them was supposed to be out there at all times, when they were crossing the crossings.

I didn't quite get your question clear. May I ask, shoving empties or just the crummy?

Q. Just the crummy.

A. Just the crummy.

Q. If they were shoving empties, what was the requirement?

A. When they shoved empties, it was the requirement when I worked second brakeman to be in the middle of the empties, in sight of the engineer and the head brakeman and relay the signal from the head brakeman, whatever it might be—to stop or proceed.

Q. In what form were these regulations,—written or oral? A. Oral.

Q. And how were they communicated to the—by whom were they communicated to the trainmen?

A. By whom?

Q. Yes. A. The trainmaster.

Q. Anyone else?

A. And the man in charge. Mr. Morgan, he was there at that time. [516] And Pete Klein before him. I believe it is spelled K-l-e-i-n (spelling).

(Testimony of George Groseclose.)

Q. Have you heard Mr. Ellingson communicate this regulation to the trainmen?

A. Yes, I have.

Q. Was that prior to May 21, 1940?

A. Yes.

Mr. Maxwell: Your witness.

Cross Examination

Q. (Mr. Walker) What trainmen did you hear Mr. Ellingson communicate the regulations to?

A. Which trainmen?

Q. Yes. A. C. B. Groves, for one.

Q. When was that?

A. The exact date, I haven't that.

Q. About?

A. Well, I would say in the first part of 1940, I would say.

Q. Where? A. At Railroad Camp.

Q. Where in Railroad Camp?

A. As I remember it, it was out in front of the office.

Q. Who all were present?

A. Mr. Ellingson and I and Mr. Groves were three.

Q. Who? [517]

A. And Mr. Groves, for three. I don't remember if the second brakeman was there or not.

Q. Who was Mr. Groves' second brakeman there at that time?

A. The second brakemen changed quite frequently, and I don't remember who was working with him at the time.

(Testimony of George Groseclose.)

Q. What run were they working?

A. I believe it was the Camp 14 run. I am not positive about that.

Q. What train were they working?

A. I believe it was Locomotive 90.

Q. What was said?

A. He warned Groves about flagging crossings.

Q. What did he say?

A. He said that he wanted the crossings flagged.

Q. What else did he say? A. That is all.

Q. What did Mr. Groves say?

A. He said he would.

Q. Did Mr. Groves say anything else?

A. No, not that I recall.

Q. How did that conversation happen to come up? A. I couldn't say.

Q. Who brought it up? A. Mr. Ellingson.

Q. Did he give any reason for bringing it up?

[518]

A. Not to me.

Q. He didn't tell you? A. No.

Q. Now, when did you give Mr. Lytle instructions?

A. When did I give Mr. Lytle instructions?

Q. Yes.

A. The last time was about two weeks before he was discharged.

Q. Where did that take place?

A. I told you—right in front of the office at Railroad Camp.

(Testimony of George Groseclose.)

Q. Who all were present? A. Him and I.

Q. Just you two? A. Yes.

Q. How did that happen to come up?

A. Mr. Lytle was the one that brought it up.

Q. What did he say?

A. He said that Bennett jumped him about not flagging those crossings, and also about that run-away that he had.

Q. Did Mr. Lytle say anything else?

A. No.

Q. What did you say?

A. I told him, if Mr. Ellingson wanted those crossings flagged, then he had better flag them.

Q. What else did you say? [519]

A. I don't remember of saying anything else.

Q. What did you do then?

A. I went back in the office.

Q. What did Mr. Lytle do?

A. Tied up the engine.

Q. What engine was it?

A. I don't remember. They worked on the relief crew, and they were on a different engine every day.

Q. What run did he have?

A. I don't remember that, either.

Q. What time of day was it?

A. I don't know. It was about, I presume, about five o'clock in the evening.

Q. Where was the second brakeman?

A. With the engine, taking oil.

(Testimony of George Groseclose.)

Q. Have you ever given any special instructions about Axford Crossing?

A. No special instructions.

Q. Were there any other trainmen that you heard Mr. Ellingson tell about the regulations before May 21, 1940, besides Mr. Groves?

A. I can't say that there was.

Q. What? A. I can't say that I did.

Q. That is the only one? [520]

A. Yes, I happened to hear that.

Q. What trainmen have you related the instructions to?

A. I haven't related them so much to the old men, like Red Williams, who has been there for 20 years. He knew the regulations long before I went there.

All the new men, though, that came there after I took my capacity, why, I instructed those.

Q. What trainmen?

A. Most all of them that were there when I came there.

Q. Who?

A. Mr. Lytle came there after,—he went working as head brakeman. Strike that off.

He was working head brakeman before I took the job as trainmaster.

Q. All right; who? A. Eddie Price.

Q. And when did you tell him the instructions?

A. When he went working head brakeman.

Q. When was that? A. I haven't the date.

(Testimony of George Groseclose.)

Q. How long ago?

A. Approximately about 8 months ago.

Q. 8 months ago?

A. Approximately that, yes.

Q. What was he doing before that? [521]

A. Second brakeman.

Q. Anybody else? A. Charles Johnson.

Q. When did you tell him?

A. Oh, that has been a couple of years ago, I guess, the first time.

Q. Where did you tell him?

A. At Railroad Camp.

Q. Where?

A. I don't exactly remember the exact spot.

Q. Who were present?

A. I don't remember if there was anybody present but him and I.

Q. What did you tell him?

A. I told him to observe those crossings and be careful at them.

Q. Anything else?

A. And to be careful at them, yes.

Q. What else?

A. To protect the rear of his train when he was stopped, if there was another train following him,—to send out a flagman.

Q. What else?

A. To run slow through camps?

Q. Is that all? [522]

A. Approximately all, I guess.

(Testimony of George Groseclose.)

Q. Did you give any instructions to engineers?

A. No. We gave our instructions to the head brakeman. He is the man in charge.

Q. Did you give any instructions to the engineer as to what to do in the event the brakemen did not perform their duties?

A. No, I didn't.

Q. Have you ever observed any brakeman fail-gineer when the crummy is being shoved across a crossing? A. No.

Q. Have you ever observed at any time before May 21, 1940, when the crummy was being shoved across a crossing without a brakeman being on the crummy in full view of the engineer at all times?

[523]

A. No.

Q. Is it all right under your regulations for the brakeman to be in the dog house as long as the crummy isn't being pushed over a crossing? [524]

The Witness: Yes.

Q. You make reports to Mr. Ellingson and Mr. Polson, don't you?

A. I don't understand your question.

Q. (Mr. Walker, continuing) Do you make reports to them?

A. I keep a record of all dispatching.

Q. And do you report to them on dispatching?

A. It is there for them to see whenever they want to see it. [525] It isn't turned in to the main office.

Q. Do you make any other reports to them?

(Testimony of George Groseclose.)

A. No, sir.

Q. If you observed any trainmen violating any regulations, you wouldn't report that either, would you?

A. I would, yes.

Q. Now, in the event you observed a trainman crossing a crossing in excess of three miles an hour, would you report that?

A. I would either tell the brakeman about it, myself, or I would report it to the man in charge.

Q. Well, which would you do?

A. I would, no doubt, report it.

Q. (Mr. Walker, continuing) A train crossing a crossing in excess of three miles an hour would be a violation of your regulations, would it not?

A. Not entirely, no.

Q. Will you explain that?

A. Yes. When I was working as head brakeman, the train never crossed that crossing to exceed three miles an hour when [526] we approached the crossing,—when I was working as head brakeman. If you understand railroading—we approached the crossing, you know, by car lengths—and three or four car lengths, you see, from the crossing, we were always out there observing the crossing. If the crossing was clear and no cars coming, we flagged the train to proceed across.

Q. (Mr. Walker) When the string of cars were behind, the speed limit of three miles an hour applied, is that right?

(Testimony of George Groseclose.)

A. That is when I was braking, yes.

Q. Now, in your present capacity, and in view of your testimony of reporting violations of regulations, if you had observed an engineer permitting his train to go across the crossing in excess of three miles an hour, pulling a string of empties, you would report that, would you not? [527]

A. I would say that I would report them if they weren't under control. I don't exactly say three miles an hour.

Q. (Mr. Walker, continuing) Oh, you don't

A. I told you that three miles an hour was when I was working [528] in the train service.

Q. (Mr. Walker, continuing) Is it your testimony now that the company rule now is that the train must proceed to a crossing at about three miles an hour, and if no cars are on the highway then proceed across the crossing, but if cars are on the highway, the train is to stop? A. Yes.

KALIS HECK

called as a witness by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination [529]

By Mr. Maxwell:

Q. Will you state your name, please, Mr. Heck?

A. Kalis Heck (spelling).

(Testimony of Kalis Heck.)

Q. Where are you employed, Mr. Heck?

A. Polson Logging Company.

Q. How long have you been employed there?

A. About 16 years.

Q. In what capacity have you been employed?

A. I started in there as a brakeman. At the present time, I am a shop helper.

Mr. Walker: May I have that answer read, please?

(Whereupon the last answer was read.)

Q. (Mr. Maxwell, continuing): How long have you been a shop helper approximately?

A. About 11 months.

Q. Are you familiar with the rules and regulations of the company? A. I am.

Q. What is the company rule or regulation regarding the flagging of crossings?

A. In my time, when I was braking, it was, if you were pushing a train, your whole train ahead of you, you stopped,—the flag man went out with a red flag and flagged the crossing. If you were pushing the crummy, you brought your train down under control by signals from the brakeman, from one of them. If the crossing was clear, the highway crossing, you proceeded. [530]

Q. In the event you were pushing the crummy across the crossing ahead of the engine, where was the brakeman supposed to be?

A. One or both of them was supposed to be out

(Testimony of Kalis Heck.)

on the front end, as near the front end as they could be, next to the highway crossing.

Q. In what form are these regulations,—oral or written? A. Oral.

Q. And how were they communicated to you—by whom, I mean?

A. The first I got was from Mr. Pete Klein, Jack Morgan, Billy Gordon, George Groseclose and Robert Polson, and Bennett Ellingson.

Q. Did this rule requiring the flagging of crossings apply to all main highway crossings?

A. Yes.

Q. Was this rule in force on May 21, 1940?

A. Yes.

Q. And how long prior to that time had it been the rule? A. Oh, I don't recall that.

Q. Can you give me an approximate period, a month or years? A. Well, I would say in '28.

[531]

Q. (Mr. Walker, continuing): Are you a member of any labor organization?

A. The Woodworkers of America,—International Woodworkers of America.

Q. During the time you worked on the railroad, before you were put in the shop, were you a member of the Brotherhood? A. No. [532]

Mr. Maxwell: It is hereby stipulated and agreed that the respondent would call Charles Young as a witness, and that if called, said Charles Young would testify as follows:

During 1937 the Aetna Casualty Company carried Public Liability insurance of the Polson Logging Company covering liability arising out of injuries to the public and the company's logging operations. This included accidents at [533] crossings of the company's logging railroad and state highway. During the year 1937 the company experienced three accidents at said crossings, the last being in November, 1937, and was known as the Stearns accident. The Aetna Casualty Company sent Mr. Charles Young to Hoquiam to investigate the accidents and the Polson Logging Company's enforcement of regulations requiring flagging crossings.

Mr. Young talked with Mr. Len Forrest, Safety Engineer for the Polson Logging Company, and was informed that the company's instructions required trainmen to flag highway crossings.

Mr. Charles Young personally spot checked the enforcement of the company's requirement that highway crossing be flagged by following some of the trains and watching the highway crossings. These spot checks were made over a period of time during the last part of 1937 and the first part of 1938. His checks disclosed that the highway crossings were being flagged.

It is so stipulated?

Mr. Stevens: We so stipulate.

Mr. Maxwell: Mr. Walker?

Mr. Walker: We so stipulate. [534]

DAVE LYTLE

previously sworn, was recalled as a witness by and on behalf of the Board and further testified as follows:

Direct Examination

Q. (Mr. Walker): You are the same Dave Lytle who testified here heretofore, is that correct?

A. Yes.

Q. Mr. Lytle, the Saturday following May 21st, in a conversation with Mr. Ellingson, at the office in Hoquiam, did you tell Mr. Ellingson that you knew that you were wrong in being in the dog house on the crummy while it was crossing Crossing No. 1? A. No.

Q. At your house, following the Stevens Creek runaway, did Mr. Ellingson tell you that you had one more chance? A. No.

Q. Did he tell you at that time and place also, "Don't forget the safety rules, especially the rules on crossings"?' A. No. [536]

Q. (Mr. Walker, continuing): Mr. Lytle, I call your attention to the testimony of Mr. Ellingson in which he testified that he [538] had a conversation with you about flagging crossing which occurred following a time when the company discontinued the practice of requiring the brakemen to get off the train and flag the crossing; do you have that in mind? A. Yes.

Q. At that time, did Mr. Ellingson tell you never to let the crummy be shoved ahead of the

(Testimony of Dave Lytle.)

engine over crossings without one man being on the crummy and, even if at night, to signal with the lantern? A. No. [539]

Q. (Mr. Walker, continuing): Were you ever told during all of the time that you worked for the company that one brakeman must be in full sight of the engineer at all times when the crummy is being pushed ahead of the engine, by either Mr. Arnold Polson, Mr. Alec Polson, Mr. Groseclose or Mr. Ellingson? A. No.

Q. Were you told that, in substance and effect, at any time, by any of them? A. No.

Q. During all of the time that you worked for the company, were you ever given a copy of Respondent's Exhibit No. 1 by Mr. Arnold Polson, Mr. Alec Polson, Mr. Groseclose or Mr. Ellingson?

A. No.

Q. Did you ever see a copy of Respondent's Exhibit No. 1 posted on the railroad camp bulletin board? A. No. [541]

Q. Did you ever see a copy of Respondent's Exhibit No. 1 posted in any of the engines?

A. No.

Q. Were you ever told to get a copy of Respondent's Exhibit 1 by Mr. Arnold Polson, Mr. Alec Polson, Mr. Golick, Mr. Groseclose, or Mr. Ellingson? A. No.

Q. Were you ever told that copies of Respondent's Exhibit No. 1 were available to you, by Mr.

(Testimony of Dave Lytle.)

Arnold Polson, Mr. Alec Polson, Mr. Groseclose, Mr. Ellingson or Mr. Golick? A. No.

Q. Did you ever see a sign posted in the office at Railroad Camp over a pile of approximately 20 copies of Respondent's Exhibit 1, informing you to "Take one and use it"? A. No. [542]

Q. (Mr. Walker, continuing): After the day on which you had the runaway down Stevens Creek, did you lose any time because of the runaway? A. No.

Q. That day on Stevens Creek, did you set any brakes on the cars?

Mr. Maxwell: I will object to that as being totally immaterial—whether he did or didn't.

Trial Examiner Kent: I will sustain the objection.

Mr. Walker: After leaving No. 4 Junction, on the Stevens Creek run, did you have occasion to stop at any place?

Mr. Maxwell: I will object to that as totally immaterial, having no bearing upon the issue, and being improper rebuttal.

Trial Examiner Kent: What is the purpose of the inquiry?

Mr. Walker: The purpose of this, Mr. Examiner, is to elicit rebuttal testimony from this witness to the effect that the engine crews at all times, while running on the Stevens Creek run, stopped at the Humptulips Water Tank to take water; that

(Testimony of Dave Lytle.)

on this date, after leaving No. 4 Junction, the train was able to stop at Humptulips Water Tank, even though it had slipped a tire.

Trial Examiner Kent: It wasn't able, or was able?

Mr. Walker: Was able. [543]

Trial Examiner Kent: Well, what is your contention as to the materiality? That is what I wanted you to state?

Mr. Walker: If I remember correctly, when we were in session before the recess, I think that at that time I took the position that testimony concerning the runaway was not material because of its remoteness and because of the fact that it was not being made an issue as a reason for discharge.

However, when the respondent was putting in its case, Mr. Ellingson testified that he spoke to Mr. Lytle about the runaway, caused him to be suspended for two days by reason of the runaway, and further warned him about crossing crossings.

And he says the reason he remembered warning him about crossing crossings is because he had been getting slack in his work.

Now, on cross examination I asked Mr. Ellingson if it wasn't true that the engine on that day hadn't slipped a tire and was ordered to be put in the shops by Mr. Alec Polson.

It is purely a matter going to the credibility of the witness, Ellingson.

(Testimony of Dave Lytle.)

Mr. Maxwell: You can't impeach a man on a collateral matter, Mr. Examiner.

That point is pretty well established, and it has no bearing upon any issue here.

I believe there was testimony as to the conversation that he was warned about the safety rules, and particularly cautioned [544] to observe the flagging of crossings, as had been done before. I can't see the materiality of counsel's contention.

Trial Examiner Kent: I will sustain the objection.

Mr. Walker: Under the ruling that this matter is immaterial, and further that it cannot be used for impeachment purposes, then I move that all testimony anywhere in the record relating to the Stevens Creek runaway be stricken.

Mr. Stevens: I would like to urge, Mr. Examiner, in support of Mr. Walker's motion, and by inference, at least, all that has been said here and testified to heretofore on that subject would tend at least or was intended to indicate that Mr. Lytle's services, other than this particular question of flagging No. 1 crossing, was not satisfactory, and that may have entered into the reason for his discharge.

And inasmuch as respondent opened it up on cross examination, if it is received for one purpose, it should be received for all purposes.

Mr. Maxwell: Mr. Examiner, may I be heard on that?

(Testimony of Dave Lytle.)

I recall that on cross examination of Mr. Lytle, I asked him about this runaway. It is true that was for the purpose of fixing a date,—the date of the conversation between Mr. Ellingson and Mr. Lytle.

Then I asked him if Mr. Ellingson at that time didn't also warn him and refresh his recollection on the flagging of crossings. [545]

Now, the Stevens Creek runaway, as far as any testimony in this record, I don't think that it amounts to anything as far as the issues are concerned.

Mr. Walker: Will you join in the motion?

Mr. Maxwell: What is that?

Mr. Walker: That it all be stricken.

Mr. Maxwell: Including the suspension and everything. The only purpose of that was to fix the date.

Trial Examiner Kent: Well, in view of counsel's question, that that was only to fix the date, I think that it may be stricken other than——

Mr. Walker (Interposing): Stricken for all purposes?

Trial Examiner Kent: All purposes excepting that part of it, at least,—that it was inserted in the record to fix the date that certain conversations took place.

Q. (Mr. Walker, continuing): About two weeks before May 21st, 1940, in front of the office at Railroad Camp, did you have a conversation with Mr. Groseclose in which you said, "Bennett jumped me

(Testimony of Dave Lytle.)

about crossings and the runaway", to which Mr. Groseclose replied, "If Mr. Ellingson wants crossings flagged, you had better flag them"?

A. No.

Q. At any time before May 21st, 1940, were you warned about your work being careless, by Mr. Ellingson or Mr. Arnold Polson or Mr. Alec Polson or Mr. Groseclose? [546] A. No. [547]

Q. (Mr. Walker, continuing): At any time before May 21, 1940, were you warned about crossing rules by Mr. Ellingson? A. No.

Q. Or by anyone else representing the company—that is, Mr. Arnold Polson, Mr. Alec Polson or Mr. Groseclose? A. No.

Mr. Walker: That is all.

Cross Examination

Q. (Mr. Maxwell): Mr. Lytle, do I understand from your testimony that the company had no rule or regulation regarding the flagging of highway crossings?

A. May I have that question again?

(Whereupon the last question was read.)

A. Yes.

Q. (Mr. Maxwell, continuing): You were never instructed to flag a highway crossing?

A. No.

Q. And there was no company rule or regulation that required it? A. No.

Q. How long have you worked for the company? A. Since 1934.

(Testimony of Dave Lytle.)

Q. During that time, had it been your practice to flag the highway crossings?

A. Can I explain that? [548]

Q. Just answer the question if you can. I have no objection to your explaining it. A. No.

Q. Have you never flagged a highway crossing?

A. No.

Q. Mr. Lytle, calling your attention to your earlier testimony that in 1937 Mr. Ellingson told you to stop flagging highway crossings,—do you recall that? A. Yes.

Q. Does that refresh your recollection that you had been flagging them?

A. Flagging No. 3 and No. 5 crossings through with loads or empties.

A. So that you had been flagging them?

A. I had been standing in the highway alongside the loads or the empties, yes, but not flagging the trains through.

Q. And why were you doing that?

A. That was orders from Mr. Alec Polson.

Mr. Maxwell: That is all, thank you.

Redirect Examination

Q. (Mr. Walker): A while ago, you were going to explain an answer. What was your explanation?

A. That we had been given orders to flag through at night with loads or empties by dropping off the locomotive when the locomotive got on the crossing and standing in the highway with [549]

(Testimony of Dave Lytle.)

a lantern until the train had gotten by, and then catching the tail end, and then either walking over the empties or having the train stopped and then walk alongside the train up to the locomotive again.

Q. Had you ever been given an instruction concerning a rule or regulation to flag crossing No. 1, either day or night, with loads or empties?

A. No.

CLAYTON REECE

previously sworn, was recalled as a witness by and on behalf of the Board and further testified as follows:

Direct Examination

Q. (Mr. Walker): You are the same Clayton Reece who testified here before, is that correct?

A. Yes.

Q. Mr. Reece, when you came to work for Polson Logging Company, did you work at any time when Mr. Arnold Polson was superintendent or part-time superintendent?

A. No, I don't believe I did.

Q. Were you ever told that one brakeman must be in full sight of the engineer at all times when the crummy is being pushed [550] across ahead of the engine, by Mr. Arnold Polson, Mr. Alec Polson, Mr. Groseclose, or Mr. Ellingson?

A. No.

(Testimony of Clayton Reece.)

Q. Or that in substance and effect by any of them? A. No.

Q. During all of the time that you have worked for the company were you ever given a copy of Respondent's Exhibit No. 1 by Mr. Arnold Polson, Mr. Alec Polson, Mr. Groseclose or Mr. Ellington?

A. No.

Q. (Mr. Walker, continuing): During any of the time that you worked for the Polson Logging Company, did you ever see a stack of approximately 20 copies of Respondent's Exhibit No. 1, with a sign above it, reading "Take one and use it"?

A. No. [551]

Q. Were you ever told to get a copy of Respondent's Exhibit No. 1 by Mr. Arnold Polson, Mr. Alec Polson, Mr. Ellington or Mr. Groseclose or Mr. Golick?

A. No.

Q. Were you ever told copies of Respondent's Exhibit No. 1 were available for you by Mr. Arnold Polson, Mr. Alec Polson, Mr. Golick, Mr. Groseclose or Mr. Ellington?

A. No.

Q. Did you ever see one in any engine?

A. No.

Q. (Mr. Walker, continuing): Were you ever told by Mr. Arnold Polson, Mr. Alec Polson, Mr. Ellington, or Mr. Groseclose, during all of the time that you worked for the company, that one brakeman must be in full sight of the engineer at all times when the crummy is being pushed ahead of the engine across a crossing? [552]

(Testimony of Clayton Reece.)

A. No.

Mr. Walker: That is all.

Cross-Examination

Q. (Mr. Maxwell): Mr. Reece, you have worked as second brakeman, haven't you?

A. That is right.

Q. From whom do you get your instructions as second brakeman?

A. From the head brakeman.

Q. Did the head brakeman ever instruct you about flagging the crossings? A. No.

Q. No head brakeman has ever instructed you?

A. That is right.

Q. Mr. Reece, what is the signal when a man is injured; what is the whistle signal?

A. Different outfits use different signals.

Q. (Mr. Maxwell, continuing): What is the signal at Polson? [553]

A. I don't know.

Q. (Mr. Maxwell, continuing): Mr. Reece, were you familiar with the company regulation requiring the flagging of crossings?

A. I didn't know they had any.

Q. Have you worked with any other head brakeman besides Mr. Lytle? A. Yes.

Q. Have you worked with other head brakemen when the crummy was being pushed across crossings ahead of the engine? A. Yes.

Q. What was done by the brakemen under those circumstances?

(Testimony of Clayton Reece.)

A. What circumstances do you mean?

Q. Where the engine was pushing the crummy ahead of it, across the highway crossing?

A. They all done pretty much the same—used their own judgment.

Q. Well, what was that judgment; what did they do?

A. Sometimes they stood on the flat car and sometimes they stood in the dog house. It just depended on different things—different conditions.

Q. You say they stood out on the flat car; do you mean out on the front end of the flat car?

A. Sometimes.

Q. When they were out on the front end of the flat car, what were they doing? [554]

A. Nothing; standing there.

Q. Well, were they watching for traffic on the highway? A. I suppose, yes.

Q. Did you ever see any of them out on the front end of the flat car give the engineer the “go ahead” or “all clear” signal?

A. Under certain conditions, yes.

Q. Mr. Reece, have you worked on a train in which the engine was pushing a string of empties ahead of it across a crossing? A. Yes.

Q. Where was the head brakeman then?

A. On the head end.

Q. And what did they do on reaching the crossing?

A. They didn't always do the same thing.

(Testimony of Clayton Reece.)

Q. Well, where were you as second brakeman?

A. It depended on the length of the train.

Q. Well, how many cars would they usually push ahead of an engine, a string of cars,—15 or 20?

A. No, I never worked on a job where they shoved that many.

Q. How many is the most that you recall being shoved ahead of the engine when you were working on the train?

A. Mostly it was trucks—12 or 14 sets of trucks.

Q. And where were you when the engine was pushing those across the crossing?

A. On the crummy. [555]

Q. And where was the crummy?

A. Next to the engine.

Q. Did the train stop before crossing the highway? A. No.

Q. It never did?

A. Oh, sometimes it did—not all the time.

Q. Did the brakeman get out and flag?

A. When he had to stop, yes. When he didn't, he stayed on the end.

Q. Did you ever work as second brakeman with Mr. Groseclose? A. No.

Q. Were you ever instructed that in the absence of the head brakeman, that you were to do the flagging?

A. No, I never had no instruction to that effect.

Q. You never had any instructions from the head brakeman at all, is that correct?

(Testimony of Clayton Reece.)

A. Yes.

Q. Have you ever flagged a crossing?

A. Sure; I have flagged crossings.

Q. What was the reason for flagging the crossing?
A. Safety reasons.

Q. Pardon? A. Safety.

Q. At whose instructions did you flag?

A. No instruction. [556]

W. J. WILLIAMS,

called as a witness by and on behalf of the Board.

Direct Examination

By Mr. Walker:

Q. Your name is W. J. Wililams, is it?

A. Yes, sir.

Q. Are you employed by the Polson Logging Company?
A. Yes.

Q. How long have you been employed by them?

A. Very nearly 20 years, off and on.

Q. And in what capacity have you been employed by them?

A. Mostly as a brakeman—head brakeman.

Q. Where is your residence, where do you live?

A. Hoquiam. [557]

Q. (Mr. Walker, continuing): At any time, when you worked for the company, and Mr. Arnold Polson was superintendent between 1930 and 1934, did he tell you rules of flagging crossings to

(Testimony of W. J. Williams.)

the effect that if cars were being shoved ahead of the engine across crossings, then for one brakeman to be out on the head [558] car in sight of the engineer to stop the train before arriving at the crossing, the brakeman to get off onto the ground, walk ahead to the crossing and if no movement appears on the highway, order the train to proceed and catch the back end after the train has cleared the crossing? A. No.

Q. Did Mr. Arnold Polson tell you anything in substance or effect like that? A. No.

Q. Did Mr. Alec Polson or Mr. Groseclose or Mr. Ellingson tell you of such a rule? A. No.

Q. Or in substance and effect a rule similar to that which I quoted? A. No.

Q. (Mr. Walker, continuing): At any time when you were employed by the company and particularly when Mr. Arnold Polson was the superintendent from 1930 to 1934, did he tell you of a rule concerning flagging crossings to the effect that a brakeman was to get out on the crummy, when it was being pushed ahead of the engine, before it reaches the crossing, so the brakeman could see if there was any movement on the highway, and to order [559] the engineer to slow the train down, getting it under control, and signalling for a stop if the crossing was occupied? A. No.

Q. Did he tell you anything like that in substance or effect? A. No, sir.

Q. Did Mr. Alec Polson, Mr. Ellingson, or Mr.

(Testimony of W. J. Williams.)

Groseclose, tell you of a rule as I have previously quoted it to you? A. No.

Q. Did either Mr. Alec Polson, Mr. Ellingson or Mr. Groseclose tell you anything like that or to the effect of that which I have quoted?

A. No, sir.

Q. During all of the time that you have worked for the Polson Logging Company, were you ever given a copy of respondent's exhibit No. 1 by Mr. Arnold Polson, Mr. Alec Polson, Mr. Ellingson, Mr. Groseclose,—that Respondent's Exhibit No. 1, Mr. Williams, is that grey bound book lying in front of you. A. I was never given one.

Q. Did you ever see a pile of approximately 20 or 30 copies of Respondent's Exhibit 1 in the office at Railroad Camp with a sign above it reading "Take one and use it"? A. No, sir.

Q. Did you ever see a copy of Respondent's Exhibit No. 1 posted in an engine?

A. No. [560]

Q. Were you ever told to get a copy of Respondent's Exhibit No. 1 by Mr. Alec Polson, Mr. Arnold Polson, Mr. Golick or Mr. Groseclose or Mr. Ellingson? A. No.

Q. Were you ever told copies of Respondent's Exhibit No. 1 were available for you by Mr. Arnold Polson, Mr. Alec Polson, Mr. Golick, Mr. Groseclose or Mr. Ellingson? A. No.

Q. Now, did you have a conversation with Mr. Ellingson at a time shortly after Mr. Lytle's and Mr. Reece's discharge? [561]

(Testimony of W. J. Williams.)

A. In the office.

Q. How did the conversation start out?

A. Well, he just mentioned that I had been working for the company for a few years, and he just wanted to know about how I would go about flagging a crossing. And I told him, I says, "Flagging a crossing, I don't know of any other way to flag a crossing without stopping; that was the only way I knew of to flag a crossing". He said it wasn't necessary to stop.

Q. And after he said that it wasn't necessary to stop, did you say anything further?

A. I don't believe there was much more. [562]

Cross-Examination

By Mr. Maxwell:

Q. Mr. Williams, if I understood you correctly you stated that Mr. Arnold Polson, during the time that he was superintendent, had never instructed you regarding the flagging of crossings?

A. He had not.

Q. Did you ever receive any instructions from him at all? A. Possibly about the work.

Q. Is it possible that he may have told you and you might have forgotten?

A. Not that I recall, no, sir.

Q. What did you do on reaching a crossing at which you were head brakeman and the engine was pushing the crummy ahead of it—what is done?

A. There were a lot of instances where a man

(Testimony of W. J. Williams.)

maybe would be looking out of the window or standing in the doorway, and there would be occasions where a man would be out a few feet from the dog house.

Q. You flagged the crossings, did you?

A. No; we couldn't flag it that way. [563]

Q. Well, what did you do?

A. We just kept agoing.

Q. Did you look for traffic?

A. Person would naturally look.

Q. Were you in a position out on the end of the crummy—

A. (Interposing): Not out on the end, no,—not all of the time.

Q. Were you ever a brakeman on a train pushing a string of empties across ahead of the engine?

A. I have been several times.

Q. Where does the head brakeman ride?

A. Most of the time he is on the head end of the empties.

Q. And what is the reason for riding there?

A. More or less just a habit—watch the—

Q. (Interposing): Were you ever instructed to ride there?

A. I couldn't say that I had been—just a general habit.

Q. What did you do under those circumstances, when the train approached a crossing—what was the train doing, was the train stopped?

A. Not all of the time.

(Testimony of W. J. Williams.)

Q. Did you get off upon the highway and flag it?

A. If you would see a car coming, possibly.

Q. What about at night?

A. We never shoved empties across at night.

That is, I never did.

Q. Did you ever have a copy of Respondent's Exhibit No. 1? [564]

A. No.

Q. You never have had one?

A. I never did.

Q. Were you running out of railroad camp in 1936?

A. Yes.

Q. Did you go in the office there?

A. The only time I was in the office was just to make out the time slip.

Q. Did you look at the call board?

A. Yes.

Q. Do you recall this sign that was up there above a stack of these exhibits which said "Take one and use it"?

A. I do not.

Q. Do you recall that there was some levity about the sign at the time?

A. No, sir. [565]

WIRT THOMAS

called as a witness by and on behalf of the Board.

Direct Examination

Q. (Mr. Walker): You are Mr. Wirt Thomas, is that correct?

A. That is what they have called me for over 50 years.

(Testimony of Wirt Thomas.)

Q. And where do you live, Mr. Thomas?

A. 605 9th Street, Hoquiam.

Q. Are you employed by the Polson Logging Company?

A. Yes, sir.

Q. How long have you been employed by them?

A. Well, the first time I went to work for them was 1913—off and on since.

Q. In what capacity are you employed?

A. Brakeman.

Q. Are you a brakeman?

A. Brakeman, yes, sir.

Q. How long have you done braking on the Polson system?

A. I think that it was '15—1915.

Q. Since 1915?

A. Yes. [570]

Q. And you are which—a head brakeman or a second brakeman?

A. A head brakeman. I don't work at that now.

Q. Mr. Thomas, during the time when Mr. Arnold Polson was superintendent from 1930 until 1934, during any of that period of time, did he tell you of a rule concerning flagging of crossings to the effect that if cars are being shoved ahead of an engine across a crossing, one of the brakemen must be out on the head car in sight of the engineer, for the train to stop before arriving at the crossing, the brakeman to get on the ground and walk ahead of the train to the crossing, and if no movement appears on the highway, then to order the train

(Testimony of Wirt Thomas.)

to proceed across the crossing and catch the back end of the train after clearing the crossing?

A. No; but I could have saved you a lot of that, because during most of that time I was braking here, I was loading at Camp 8 during most of that period. [571]

Q. (Mr. Walker, continuing): Did Mr. Alec Polson or Mr. Ellingson or Mr. Groseclose tell you of a rule concerning flagging crossings in the manner in which I described it before?

A. No, they never.

Q. Did either of those three tell you anything similar to that, or to that effect? A. No.

Q. (Mr. Walker, continuing): Did Mr. Arnold Polson, Mr. Alec Polson, Mr. Ellingson or Mr. Groseclose or any of them at any time you have worked for the company tell you of a rule concerning flagging to the effect that "One of the brakemen must get out on the crummy when it is being pushed ahead of the engine, before the train reaches the crossing, so the brakeman could see whether or not there was any movement on the highway and order the engineer to slow down, bringing the train under control, and signal for a stop if the crossing was occupied"?

A. Well, no; but at one time Mr. Ellingson was on the car and we was talking about it, and he asked me where I would be if it was shoving—going across, making a crossing of that kind. I said, "Well, I most likely would be out on the flat

(Testimony of Wirt Thomas.)

car—without something happened behind like you had chained trucks or something and if a chain was down, I might be back there putting that chain up and then they would go on and get to the [572] crossing before I could get back over. [573]

Q. (Mr. Walker, continuing): Have there ever been any times, Mr. Walker, when Mr. Ellingson has ridden in the dog house with you?

A. Yes, sir. [575]

Q. (Mr. Walker, continuing): Have there been any of those times, Mr. Thomas, when you and your second and Mr. Ellingson were all in the dog house while the crummy was being pushed over a crossing?

A. Well, I can't say that there ever was. That we was all inside the dog house,—coming to a crossing, I am always curious enough to step out, anyway,—stick my head out and be in full sight of the engineer.

Q. When you stick your head out, are you in full sight of the engineer?

A. Well, you are on some of the engines. On some of the engines there, you can't get in sight of the engineer without hanging over the side of the car. For instance, the 51, the tender is so wide and the oil tank is so high that he can't see around it without you get clear out over the side of the car.

Q. Could the engineer on 51 see the brakeman if the brakeman was out on the point of the crummy?

(Testimony of Wirt Thomas.)

Mr. Maxwell: I object to that as totally immaterial. 51 wasn't the engine. Suppose it was?

Mr. Walker: The rule isn't limited to engine 18, either. We are willing to stipulate if you want to, counsel.

Trial Examiner Kent: The answer may be taken.

Mr. Maxwell: On the 51? [577]

Trial Examiner Kent: Yes.

Mr. Walker: Since the rule applies to the 51, I presume.

Mr. Maxwell: Certainly. It applies to all, and has for many years.

Mr. Walker: Will you read the question, Mr. Reporter?

(Whereupon the question referred to was read as follows:

“Q. (Mr. Walker): Could the engineer on 51 see the brakeman if the brakeman was out on the point of the crummy?”)

The Witness: Not without the engineer was hanging a long ways out the window, he couldn't.

Mr. Stevens: Your witness, Mr. Maxwell.

Cross Examination

Q. (Mr. Maxwell): Mr. Thomas, have you ever ridden on Engine 51 when it was pushing a crummy ahead of it across a crossing? A. Yes.

Q. Have you ever ridden on the engineer's seat?

(Testimony of Wirt Thomas.)

A. No, sir, there ain't no seat for you to get on on his side.

Q. Then upon what do you predicate your statement that the engineer couldn't see the brakeman unless the brakeman was hanging out the side of the crummy?

A. You have to get out away from the track to get a signal to him.

Q. Have you ever been up in the engineer's seat and looked back over the tender to the crummy?

[578]

A. You can't see over it.

Q. Have you ever been up there and looked back?

A. Yes, I have been in it and looked back. I have been up in it.

Q. You flagged the highway crossings when they were pushing cars ahead of the engine, have you not?

A. Yes, that has been a State law in this State for years.

Q. And you flagged the highway crossings when they were pushing the crummy ahead, did you not—by getting out on the crummy?

A. Sometimes, and sometimes—lots of times that I haven't.

Q. If you haven't, your second brakeman has?

A. Well, lots of times you would be on the other end, adoin' something, and won't get back across.

(Testimony of Wirt Thomas.)

There have been lots of cases, lots of times that it has happened that way.

Q. And the second brakeman then flags?

A. Well, I don't know. Some of the second brakemen, you can't depend on them to do anything.

Q. Well, you would expect the second brakeman to do that, wouldn't you, if you were the head brakeman?

A. Well, yes; you are supposed to,—that is the State law, all right.

Mr. Maxwell: That is all.

Redirect Examination

Q. (Mr. Walker): Mr. Thomas, how long has it been since a train [579] you have worked on has pushed a string of cars out of railroad camp over Crossing No. 1?

A. Let's see, I don't know; it has been, I guess, around '34 or '35 is when they started hauling them out. They might shove a couple of cars, or something like that. [580]

In the United States Circuit Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

POLSON LOGGING COMPANY,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its Director of the Field Division, duly authorized by Section 1 of Article VI, Rules and Regulations of the National Labor Relations Board—Series 2, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record in a proceeding had before said Board entitled, “In the Matter of Polson Logging Company and Brotherhood of Railroad Trainmen,” the same being Case No. C-2046, before said Board, such transcript including the pleadings, testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Stenographic transcript of testimony before Trial Examiner Henry J. Kent on July 28, 29,

30, 31, September 12 and 13, 1941, together with all exhibits introduced into evidence.

(2) Copy of respondent's telegram, dated September 25, 1941, requesting Trial Examiner for extension of time to file brief.

(3) Copy of telegram dated September 26, 1942, granting respondent extension of time to file brief.

(4) Copy of motion filed by Board's attorney for correction of certain part of transcript, dated September 29, 1941.

(5) Stipulation for the correction of the stenographic transcript signed by all parties, dated September 30, 1941.

(6) Copy of respondent's objection to motion of Board's attorney for correction of transcript.

(7) Copy of order denying motion of Board's attorney for correction in transcript of testimony issued by Trial Examiner Kent, October 30, 1941.

(8) Copy of order for corrections in transcript of testimony of stipulation of all parties issued by Trial Examiner Kent, October 30, 1941.

(9) Copy of Intermediate Report of Trial Examiner Kent, dated January 3, 1942.

(10) Copy of order transferring case to the Board, dated January 6, 1942.

(11) Copy of respondent's request for oral argument before the Board, dated January 12, 1942.

(12) Copy of notice of hearing for the purpose of oral argument, dated January 27, 1942.

(13) Copy of respondent's exceptions to the Intermediate Report.

(14) Copy of list of appearances at oral argument held before the Board, February 17, 1942.

(15) Copy of decision, findings of fact, conclusions of law and order issued by the National Labor Relations Board April 20, 1942, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof the Director of the Field Division of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 2nd day of January, 1943.

[Seal]

OSCAR S. SMITH

Director of the Field Division
NATIONAL LABOR
RELATIONS BOARD

[Endorsed]: No. 10342. United States Circuit Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Polson Logging Company, Respondent. Transcript of Record. Upon Petition for Enforcement of an Order of the National Labor Relations Board.

Filed January 11, 1943.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

POLSON LOGGING COMPANY,
Respondent,

STATEMENT OF POINTS

Pursuant to Section 6 of Rule 19 of the Court, the Board submits the following statement of points upon which it intends to rely in the Trial of the above-entitled case to the Court:

I.

The National Labor Relations Act is applicable to respondent.

II.

The Board's findings of fact are supported by substantial evidence. Upon the facts so found, respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act.

III.

The Board's order is wholly valid and proper under the Act.

ERNEST A. GROSS

Associate General Counsel
National Labor Relations
Board

Dated at Washington, D. C., this 4th day of January 1943.

[Endorsed]: Filed Jan. 11, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the attorneys for the above named parties that in lieu of printing Board Exhibit No. 12, in the record, the Board will submit 5 photostatic copies thereof, and

It Is Further Stipulated and Agreed that this exhibit although not printed shall be deemed part of the record before the Court and may be considered by the Court and referred to by the parties with the same force and effect as though printed and that either party shall have the right to have the said exhibit printed and included in the printed record in the event that appeal is later taken.

Dated at Washington, D. C., this 5th day of January, 1943.

ERNEST A. GROSS

Associate General Counsel
National Labor Relations
Board

Dated at Seattle, Washington, this 13th day of January 1943.

ROBERT W. MAXWELL, Esq.,
Attorney for the Respondent
Polson Logging Company

So Ordered:

FRANCIS A. GARRECHT,
United States Circuit Judge.

[Endorsed]: Filed Jan. 21, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

RESPONDENT'S DESIGNATION OF
POINTS

Respondent submits the following statement of points upon which it will rely at the trial of the above entitled matter to the Court:

I.

The Board erred in admitting testimony (from Tr. page 162, line 1 to page 165, line 22) over respondent's objections and in refusing to grant respondent's motion to strike said testimony admitted over respondent's objection.

II.

The Board erred in rejecting respondent's Exhibit No. 2.

III.

The Board's findings that respondent interfered with, restrained, and coerced its employees in the rights granted by Section 7 of the National Labor Relations Act are not supported by substantial evidence.

IV.

The Board's finding that Messrs. Lytle and Reece were discharged for Union activities or membership is contrary to the evidence and is not supported by substantial evidence.

Dated at Seattle, Washington, this 17th day of February, 1943.

R. W. MAXWELL

Attorney for Respondent

[Endorsed]: Filed Feb. 8, 1943. Paul P. O'Brien, Clerk.

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No. 10342

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

POLSON LOGGING COMPANY, RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ROBERT B. WATTS,

General Counsel,

ERNEST A. GROSS,

Associate General Counsel,

HOWARD LICHTENSTEIN,

Assistant General Counsel,

ROMAN BECK,

PLATONIA P. KALDES,

Attorneys,

National Labor Relations Board.

FILED

APR - 5 1943

PAUL P. O'BRIEN,
CLERK

INDEX

	Page
Jurisdiction.....	1
Statement of the Case.....	2
1. The nature of respondent's business.....	2
2. The unfair labor practices.....	2
3. The Board's order.....	3
Summary of Argument.....	3
Argument.....	4
I. The Board's findings of fact with respect to the unfair labor practices are supported by substantial evidence. Upon the facts so found, respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act.....	4
A. The motive which impelled respondent to commit the unfair labor practices here involved.....	4
B. Interference, restraint, and coercion in violation of Section 8 (1) of the Act.....	5
C. The discrimination against Lytle and Reece in violation of Section 8 (1) and (3) of the Act.....	7
II. The Board's order is valid.....	17
Conclusion.....	18
Appendix.....	20

AUTHORITIES CITED

Cases:

<i>Berkshire Knitting Mills v. N. L. R. B.</i> , 121 F. (2d) 235 (C. C. A. 3).....	18
<i>H. J. Heinz Co. v. N. L. R. B.</i> , 311 U. S. 514.....	7
<i>N. L. R. B. v. Electric Vacuum Cleaner Co.</i> , 315 U. S. 685.....	18
<i>N. L. R. B. v. Nevada Consolidated Copper Corp.</i> , 316 U. S. 105.....	17
<i>N. L. R. B. v. Pacific Gas & Electric Co.</i> , 118 F. (2d) 780 (C. C. A. 9).....	7
<i>N. L. R. B. v. Schaefer-Hitchcock Co.</i> , 131 F. (2d) 1004 (C. C. A. 9).....	7, 17
<i>N. L. R. B. v. Weyerhaeuser Timber Co.</i> , 132 F. (2d) 234 (C. C. A. 9).....	17
<i>Overnight Motor Transportation Co. v. Missell</i> , 316 U. S. 572.....	18
<i>Phelps Dodge Corp. v. N. L. R. B.</i> , 313 U. S. 177.....	17
<i>Texas Company v. N. L. R. B.</i> , 120 F. (2d) 186.....	11

Miscellaneous:

How Collective Bargaining Works, a publication of the Twentieth Century Fund: New York: American Book-Stratford Press, Inc., 1942.....	4
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**In the United States Circuit Court of Appeals
for the Ninth Circuit**

No. 10342

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

POLSON LOGGING COMPANY, RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This proceeding is before the Court on petition of the National Labor Relations Board for enforcement of its order against respondent, issued pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 1940 ed., Sec. 151, *et seq.*)¹ The Board's decision and order are reported in 40 N. L. R. B. 736, and are set forth at pages 44 to 79 of the printed record. This Court has jurisdiction of the proceeding under Section 10 (e) of the Act, since

¹ The pertinent provisions of the Act are printed in the Appendix, *infra*, p. 20.

respondent has its principal office at Hoquiam, in the State of Washington, and the unfair labor practices occurred within this judicial circuit at respondent's enterprise near Hoquiam.

STATEMENT OF THE CASE

Upon charges filed by the Brotherhood of Railroad Trainmen, herein called the Trainmen, and upon the usual proceedings under Section 10 of the Act, fully set forth in the Board's decision (R. 44-47), the Board, on April 20, 1942, issued its findings of fact, conclusions of law, and order which, briefly summarized, are as follows:

1. *The nature of respondent's business.*—Respondent, a Washington corporation, is engaged near Hoquiam, Washington, in extensive logging and sawmill operations; as part of its logging operations respondent operates a railroad for the transportation of logs from the woods to tidewater. Respondent employs about 500 men in its logging operations, of whom 33 are railroad workers (Bd. Exh. 2, R. 83-85). No question of jurisdiction is presented (Bd. Exh. 2, R. 85).

2. *The unfair labor practices.*—In violation of Section 8 (1) of the Act respondent interfered with, restrained, and coerced its railroad workers by warning that it might abandon its logging railroad, or transfer the operation of that railroad to a common carrier because of an attempt by the Brotherhoods² to organize

² We use the term "Brotherhoods" to refer collectively to the Trainmen and the Brotherhood of Locomotive Firemen and Enginemen, which, together with the Trainmen, sought to organize respondent's railroad workers in the spring of 1940, *infra*, p. 5. We sometimes refer to the latter union as the Firemen.

these workers; by interrogating some of them concerning their membership in the Brotherhoods; and by making derogatory remarks about, and threatening to discharge, an employee whom it suspected of being the instigator of the Brotherhoods' membership campaign (R. 50-54). Respondent violated Section 8 (1) and (3) of the Act by discharging and refusing to reinstate Dave Lytle and Clayton Reece, two of the leaders in the Brotherhoods, because of their union membership and activity (R. 54-70).

3. *The Board's order.*—The Board ordered respondent to cease and desist from its unfair labor practices, to reinstate Lytle and Reece with back pay, and to post appropriate notices (R. 73-75).

SUMMARY OF ARGUMENT

I. The Board's findings of fact with respect to the unfair labor practices are supported by substantial evidence. Upon the facts so found, respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act.

II. The Board's order is valid.

ARGUMENT

POINT I

The Board's findings of fact with respect to the unfair labor practices are supported by substantial evidence. Upon the facts so found, respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act

A. The motive which impelled respondent to commit the unfair labor practices here involved

In 1935, many of respondent's employees joined the United Brotherhood of Carpenters and Joiners of America, an affiliate of the American Federation of Labor (R. 122-123, 165, 317-318). A prolonged strike affecting the lumber industry of the Northwest was waged by the Carpenters in 1935 to secure recognition and obtain higher wages and better working conditions for the lumber workers.³ Another protracted strike occurred in 1936, which was settled in 1937; both strikes seriously affected respondent's operations (R. 118-122, Bd. Exhs. 7, 8, R. 191-194). In 1937 respondent's employees concertedly changed their affiliation to the Congress of Industrial Organizations, by becoming members of International Woodworkers of America, herein called the Woodworkers.⁴ Since then respondent has dealt with the Woodworkers as sole

³ A brief account of this strike is contained in Vol. 41, No. 3, pp. 656-659 of the Monthly Labor Review (September 1935), a publication of the United States Department of Labor.

⁴ This shift in affiliation was an episode in an industry-wide fight between the Carpenters and the Woodworkers. For a succinct account of the conflict, see *How Collective Bargaining Works*, a publication of the Twentieth Century Fund: New York: American Book-Stratford Press, Inc., 1942: pp. 925-926.

bargaining agent for all of its woods employees, including the railroad workers. (R. 122-128, 316-318).

In the early part of 1940 some of respondent's railway employees became dissatisfied with representation by the Woodworkers, and asked the Brotherhoods to represent them. On receiving this request, the Brotherhoods launched an organizational campaign among respondent's railroad workers (*infra*, p. 8). The unfair labor practices in which respondent engaged were committed to counteract that campaign, because respondent feared that its success would result in a jurisdictional fight between the C. I. O. and the Brotherhoods that would seriously harm its business.

B. Interference, restraint, and coercion in violation of Section 8 (1) of the Act

Bennett Ellingson, respondent's assistant superintendent, in general charge of its railroad operations (R. 355, 368), was the spearhead of respondent's opposition to the Brotherhoods' campaign. In April 1940, when, the Brotherhoods' campaign was well under way, Ellingson approached a locomotive engineer named Wood, ostensibly to ask Wood whether his engine needed repairs (R. 179-181). After Wood replied that the engine was "working pretty good," Ellingson said: "We were figuring on putting this engine in the shop and getting it overhauled; and there is a lot of repair work to be done on other engines" R. (180-181). "But," Ellingson continued, "this Brotherhood trouble has come up, and I don't know how much trouble we are going to have, and it has knocked it all in the head. If there is going to be

a lot of trouble, it is going to be shut down” (*ibid.*). Wood observed at this point that he “didn’t see why there should be any trouble,” since, he said, “the men [did not] want any” (*ibid.*). Disregarding Wood’s remark, Ellingson declared that Wood’s fellow employee, C. B. Groves, who had been a member of the Trainmen for many years (R. 216–217), was the “trouble maker” responsible for the Brotherhoods’ drive (R. 180–181).

Ellingson, in talking to another employee, named Harlan, again voiced his suspicion that Groves was the instigator of the Brotherhoods’ campaign and told Harlan that Groves was “leading [the men] astray” (R. 260–261); a few days later Ellingson followed up that remark by telling Harlan “that the Northern Pacific was going to take it [i. e., respondent’s railroad] over” (R. 262–263). Ellingson spread the same rumor to other employees. After questioning several of the railway workers as to whether they had joined the Brotherhoods, Ellingson countered their affirmative reply by asking them what they would do if the Northern Pacific Railway took over respondent’s railroad (R. 310–312, 153–154). Ellingson remarked in the hearing of another employee that “some day” the men would “all be going down the road,” because of “bucking” between the “two unions down there” (R. 265–271).

These coercive tactics were buttressed by a blunt threat to discharge Groves. That threat was made by Vic Lehman, Groves’ foreman, who was at that time in charge of Camp 6 (R. 216–217, 88–89). In the guise of friendly advice, Lehman warned Groves that he “had

better be careful [of] what [he said] about the Brotherhood” because “somebody [was] going to be let out, and it might be [Groves]” (R. 217-218).

This was, indeed, no idle threat, for, as we later point out, *infra*, pp. 7-17, respondent discharged two Brotherhood leaders soon after it learned of their prominence in those unions.

The evidence just reviewed is more than adequate to support the Board’s conclusion that respondent violated Section 8 (1) of the Act. *H. J. Heinz Co. v. N. L. R. B.*, 311 U. S. 514, 518; *N. L. R. B. v. Schaefer-Hitchcock Co.*, 131 F. (2d) 1004, 1007-1008 (C. C. A. 9); *N. L. R. B. v. Pacific Gas & Electric Co.*, 118 F. (2d) 780, 787-788 (C. C. A. 9).

C. The discrimination against Lytle and Reece in violation of Section 8 (1) and (3) of the Act

Respondent discharged Lytle and Reece assertedly because of their failure on one occasion to observe a safety regulation (R. 11, 117-118). The Board found, however (R. 55-70), that the real motive for their discharge was resentment of their leadership in the Brotherhoods. The evidence warrants that finding.

Both men were employees of long standing. Dave Lytle began to work for respondent in 1934; after being 3 weeks in its employ he was promoted to the position of head brakeman (R. 135-136). On two occasions he voluntarily left its employ, but on each occasion he was persuaded by respondent’s supervisors to return to work after a brief absence (R. 136-137). He continued in respondent’s employ thereafter until his discharge on May 21, 1940 (*ibid.*). Clayton Reece, a brakeman,

was first employed by respondent in 1928; 2 years later he was injured, and a prolonged absence from work followed (R. 286). Reece did not resume his employment with respondent, except for a short period in 1933, until May 1939, but from then on he remained in its employ until his discharge on May 21, 1940 (R. 286-287).

Both Lytle and Reece played a leading role in the Brotherhoods. When, as has been noted, respondent's workers became dissatisfied with the Woodworkers, they turned to Lytle for leadership in changing their union affiliation (R. 138-139). At the request of Lytle the Brotherhoods undertook to organize respondent's railway employees (R. 139-140). While the membership campaign was in progress, Lytle devoted a good deal of his spare time to organizing in behalf of the Brotherhoods (*ibid*). He became the chairman of the executive committee of the Trainmen (R. 156). Thereafter, when that union and the Firemen appointed a joint bargaining committee, Lytle was a member of that committee and acted as its spokesman (R. 91, Bd. Exh. 4, R. 95, 142, 156, 326). Reece was also an outstanding adherent of the Brotherhoods. He was the secretary of the Trainmen's executive committee, and an associate of Lytle on the joint bargaining committee (R. 91, 155-156).

The prominent role of Lytle and Reece in the Brotherhoods came sharply to the notice of respondent's officials in May 1940. The Brotherhoods had succeeded by this time in enrolling almost all of respondent's railway employees as members (R. 166-167). On be-

half of the joint committee, Lytle arranged for a conference with the management, which was held on May 18 (R. 141-142, 325). As the spokesman for the joint committee, Lytle presented F. Arnold Polson, respondent's general manager, with a written request for recognition by the Brotherhoods and a contract proposal (Bd. Exh. 4, R. 95-108, 89-92, 141-142, 296, 326).⁵ Manager Polson informed the committee that, in view of the exclusive recognition which had been granted the Woodworkers, he desired to consult respondent's attorney before giving consideration to the Brotherhoods' request (R. 142, 326). Polson made it very clear, however, that he opposed the change in union affiliation that had occurred. He told the committee he was not "running a railroad but a logging business," and that "one union in the business [would be] better than two" because, he said, "jurisdictional disputes were likely to arise" in the case of two unions (R. 142-143, 255-257, 267-268, 284-285, 289-290). Polson went on to express surprise, moreover, that men who had served on committees of the Woodworkers should appear before him on behalf of rival unions, adding that they were "making a mistake" (R. 142-144, 256-257, 289-290, 326-328, 357-359, 377-378).

The incident which assertedly led to the discharge of Lytle and Reece occurred on May 21, 1940—3 days after the conference just mentioned. At the end of

⁵ Two officials, besides F. Arnold Polson, were present at this conference: A. N. Polson, the superintendent, and Bennett Ellingson, the assistant superintendent (R. 91, 357, 376).

their workday on May 20, Lytle and Reece noted that they had been assigned as the braking crew of a train which was to leave respondent's camp at 5 a. m. the next morning (R. 146, 290-291).⁶ The train to which they were assigned was made up of a string of empty cars, coupled to the front of the engine, and a flatcar known as the "crummy," which was coupled to the rear of the engine; the make-up of the train was such, therefore, that the "crummy" would be pushed ahead of the engine (R. 239, 291). The "crummy" has a shanty at one end called the "dog house," which has three windows: one in front and one on each side; the latter are set in sliding panels, and may easily be opened or closed (R. 156-158, 259-260).

Before proceeding with a recital of the incident that assertedly led to the discharge of these employees, it is necessary briefly to describe where it occurred and to explain the safety regulation that was violated. Respondent's railroad, having a trackage of 45 miles, crosses the Olympic State highway, a well-paved, moderately busy artery at several points, one of which is called the Axford Prairie crossing (Bd. Exh. 2, R. 85, Bd. Exh. 12, R. 393-401, 178). For about 3 miles before reaching this crossing, respondent's tracks run parallel to the highway, and are separated from it by no more than about 50 feet (R. 242, Bd. Exh. 12). When, as on May 21, the "crummy" is being pushed ahead of the engine, the engineer is seated on the side

⁶ The daily work assignments were posted on a call board in the camp office and, though made by Groseclose, the trainmaster, were checked by Ellingson (R. 389-391).

of the engine which affords an unobstructed view of the highway along this 3-mile stretch (R. 188, 241-242, 245-246, Bd. Exh. 12). As the track approaches the Axford Prairie crossing, it turns sharply toward the highway (at an angle of about 60 degrees) before crossing it (R. 246-247, Bd. Exh. 12).

A number of years prior to the dismissal of Lytle and Reece, respondent had orally instructed its brakemen to be at the front end of the "crummy," in sight of the engineer, when their train was approaching a highway crossing, so that they could signal the engineer whether or not to proceed (R. 321-322, 352-353, 369-370).⁷ Respondent did not contend that this instruction was in-

⁷ The Trial Examiner found that respondent's employees were in disagreement as to whether this instruction had ever been given (R. 28-34); Lytle and Reece testified that they were unaware of the instruction (R. 154-155, 442-443, 450-451). The Board, however, accepted respondent's contention that it had given such an instruction, and found that Lytle and Reece should have known of its existence (R. 65-66).

The Company contended, further, that observance of the safety regulation was required by safety standards which the State of Washington had adopted. An examination of the safety standards discloses, as the Board pointed out, that the regulation was to be observed by the brakeman only if the "crummy" was not "equipped with air" (Resp. Exh. 1, R. 344, 346). Since, however, the undisputed evidence is that an air line ran through the "crummy" on which Lytle and Reece were working (R. 157), this regulation, by its very terms, was not applicable to the instant case. Furthermore, no penalty for any infraction of the safety standards was imposed until the employer had failed to comply with its requirements "for thirty days after having received a written notice from the Department [of Labor and Industries] of the violation (Resp. Exh. 1, R. 347). Plainly, therefore, the employer is given wide latitude regarding the kind of measures

tended to relieve the engineer of the obligation to see that it is safe to proceed before crossing a highway; the engineer is duty-bound under explicit instructions from respondent to warn persons on the highway of the train's approach by blowing the train whistle, and to reduce speed before crossing the highway (R. 181-182, 186-187, 221-223, 233-236, 244, 262-263, 407).

At about 5 a. m. on May 21, Assistant Superintendent Ellingson left respondent's camp in his automobile, and soon caught up with the train on which Lytle and Reece were working (R. 371).⁸ He arrived at the Axford Prairie crossing ahead of the train and got out of his automobile for the specific purpose of seeing whether Lytle and Reece would comply with the safety instruction previously mentioned (R. 371-372). He did this at the express direction of one of the Polsons.⁹

he should adopt to prevent recurrent infractions of the regulations.

These considerations render the present case wholly dissimilar from *The Texas Company v. N. L. R. B.*, 120 F. (2d) 186. Unlike the *Texas* case, in which the Court held that the Board did not consider the maritime safety laws in rendering its decision, the Board, in the present case carefully examined the logging safety standards, finding, as has been noted, that they did not apply to the situation before it.

⁸ Ellingson testified that he intended to drive to Quinault that morning on business (R. 371, 415).

⁹ This finding accords with testimony of Lytle that in discussing the infraction, Ellingson told Lytle he had received that instruction from Polson (R. 152). Neither of the Polsons denied at the hearing that he had given that instruction to Ellingson. The latter testified, however, that he had not set out with the deliberate intention of trailing the train to see whether Lytle and Reece complied with the instruction (R. 415). But, on review-

On the morning of May 21, as stated above, the engineer was seated on the side of the engine nearest the highway (R. 242-243). As the train turned toward the highway on approaching the Axford Prairie crossing, the engineer had a clear view of the highway in the direction from which the train had come; and the fireman had an unobstructed view in the opposite direction (R. 245-247). The day was clear; visibility was good (R. 243, 307). As the train was approaching the Axford Prairie crossing, the engineer and the fireman were both keeping a lookout for traffic on the highway (R. 243). Before crossing the highway, the engineer blew the whistle and reduced the train speed to about 10 miles an hour (R. 240). Lytle and Reece, though inside the "dog house," were also able to look out for danger: Lytle was standing next to the side window nearest the engineer (R. 203, 213, 310-311).¹⁰ Except for Ellingson's standing automobile, there was no vehicle in sight as the train crossed the highway (R. 247-248). The absence of danger and the careful way in which the train was being operated as it crossed the highway were plainly apparent to Ellingson. It is clear from these circumstances, as the Board found (R. 66), that in failing to be outside the "dog house," as the safety rule required, Lytle and Reece "violated

ing the testimony in the light of Ellngson's behaviour that morning, the Board found that Ellingson "trailed the train to the crossing for the specific purpose of noting whether or not the two brakemen would observe the safety rule in question" (R. 68-69).

¹⁰ Had need arisen, Lytle could easily have signalled the engineer from where he was standing (R. 150-151, 259-260).

the letter, rather than the spirit of the safety regulation in question.”

Although Ellingson testified he had set out that morning on a business errand to Quinault (R. 371-372), he did not proceed to Quinault after observing what occurred at the Axford Prairie crossing; instead, he immediately returned to respondent's camp and gave instructions that Lytle and Reece should be laid off (R. 371-372). Ellingson did not undertake at the hearing to explain why he had to abandon his business errand. Respondent did not attempt to show that the instruction to lay the men off could not have been delayed while Ellingson completed his trip to Quinault. The behavior of Ellingson in returning immediately to camp casts doubt on whether he ever intended to go to Quinault that morning and lends credence to the direct testimony in support of the Board's finding that he followed the train for the deliberate purpose of noting whether Lytle and Reece would comply with the safety instruction (*supra*, p. 12, note 9).

At the end of the day, when Lytle and Reece went to get their work assignments for the next day, the trainmaster told them they were being laid off, and that they could not return to work until they had first talked with Ellingson (R. 146-148, 281-284, 291-293).

On Saturday, May 25, Ellingson told Lytle that he and Reece had been laid off because of their failure to flag the Axford Prairie crossing (R. 149-152). Lytle protested that the crossing had never been flagged, whereupon Ellingson said that he referred to their failure to be at the front end of the “crummy” (R. 150-

151). Lytle then asked Ellingson whether Reece and he were being discharged; Ellingson replied that he would let them know on Monday, adding that he was "taking orders" from "Mr." Polson (R. 151-152). Despite Ellingson's promise, however, the men were not informed of their discharge until several weeks later, when they received formal discharge notices (Bd. Exhs. 5, 6, R. 109-110, 131-133, 152, 294-295).

The explanation given by respondent at the hearing for keeping the men in ignorance of their discharge for 3 weeks was the patently specious assertion that it desired to conduct an "investigation" before releasing them (R. 110-114). That would, indeed, have been the natural course for respondent to pursue, had it really desired to mete out discipline to the men in proportion to their dereliction; especially since, as Ellingson knew, the infraction was their first offense and had occurred under circumstances that precluded any possibility of danger. But respondent's officials made no investigation whatever; they questioned neither the men themselves nor the engineer about the infraction (R. 113).

Considering the circumstances under which the infraction occurred, the length of service of the employees, and their previously satisfactory record, it was reasonable for the Board to find, as it did (R. 66-69), that, absent resentment of their leadership in the Brotherhoods, the infraction of the safety rule by Lytle and Reece would have been condoned by respondent or, at most, passed off with a reprimand or mild penalty.

In summary, there was cogent evidence (1) that respondent was strongly opposed to representation

of its railway workers by the Brotherhoods (*supra*, pp. 5-7, 8-9; (2) Lytle and Reece were leaders in the Brotherhoods; (3) their leadership was known to respondent's officials; (4) they were discharged 3 days after respondent acquired that knowledge; (5) respondent's officials went out of their way to discover the infraction to which the discharges were later attributed; (6) the infraction itself, as respondent's officials well knew, was not of a serious nature in the circumstances under which it occurred; (7) the imposition of so drastic a penalty as dismissal, having regard to the long and previously unblemished record of these employees, and the fact that it was their first offense, was unusually severe treatment for a dereliction occurring under such circumstances; and (8) the assertion to which respondent resorted at the hearing in attempting to explain why it kept the men in ignorance of their discharge for 3 weeks after the infraction occurred was false—all these circumstances taken together fully warranted the Board in concluding that the infraction was not the real explanation for the discharges, but that respondent seized upon it as a convenient pretext to conceal the discriminatory motive which impelled it to rid itself of these men.

Opposed to the array of circumstances which support the Board's finding of discrimination is the bare fact that the infraction occurred. If in a case such as this the Board were denied the right to determine the real motive for a discharge, once a breach of discipline, or an instance of defective workmanship was shown to have occurred, the Board would be power-

less to prevent wholesale evasion of the Act, for an employer bent on violating the statute is not likely to confess his guilt. In many cases an offending employer will seize upon any infraction of a company rule, any breach of discipline, any shortcoming in an employee's work—however trivial the fault or extenuating the circumstances—as a pretext for getting rid of a union leader towards whom it is hostile. Aware of these considerations the Supreme Court and this Court have repeatedly held that where, as here, substantial evidence supports “either of two inconsistent inferences”¹¹ as the explanation for a discharge, the Board—and it alone—has the right to determine which inference should be drawn. *N. L. R. B. v. Nevada Consolidated Copper Corp.*, 316 U. S. 105; *N. L. R. B. v. Weyerhaeuser Timber Co.*, 132 F. (2d) 234 (C. C. A. 9); *N. L. R. B. v. Schaefer-Hitchcock Co.*, 131 F. (2d) 1004 (C. C. A. 9).

POINT II

The Board's order is valid

The Board's order is the usual one prescribed in cases involving violations of Section 8 (1) and (3) of the Act. Its propriety is well established. *Phelps-Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 187-189, 197; see also the authorities cited in the preceding paragraph.

¹¹ *N. L. R. B. v. Nevada Consolidated Copper Corp.*, 316 U. S. 105.

Respondent contended before the Board that after the original charges were filed,¹² the Board unjustifiably delayed the issuance of the complaint. On the basis of this assertion, respondent contended that back pay should have been suspended for the period of that delay. This contention is foreclosed by a recent decision of the Supreme Court holding that delay attributable to the administrative agency "does not warrant shifting the burden to the employee" (*Overnight Motor Transportation Co. v. Missell*, 316 U. S. 572, 583). Accord: *N. L. R. B. v. Electric Vacuum Cleaner Co.*, 315 U. S. 685, 697-698. The reason for this holding is the just principle that as between the offending employer and the victims of his unlawful conduct, the consequences of such delay should be borne by the former.

Moreover, contrary to respondent's assertion, the delay in issuance of the complaint was not unwarranted. The pressure of other cases before the Board during the period in question was extreme and delay in issuing complaints and scheduling hearings was inevitable. Aware of these considerations, the Third Circuit has recently declared: "The matter of time with regard to the issuance of a complaint by an administrative body must necessarily be one of the matters within the discretion of that body" (*Berkshire Knitting Mills v. N. L. R. B.*, 121 F. (2d) 235, 237). In short, the Board's delay in issuing the complaint

¹² The original charge was filed on July 8, 1940—about 3 weeks after respondent notified Lytle and Reece of their dismissal, *supra*, p. 15. There was, therefore, no delay whatever on the part of the employees in filing the charge.

was not unwarranted, and respondent, rather than the employees discriminated against, should properly bear the loss, even if the contrary were true.

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence, that its order is valid, and that a decree should issue enforcing the Board's order in full.

ROBERT B. WATTS,
General Counsel,

ERNEST A. GROSS,
Associate General Counsel,

HOWARD LICHTENSTEIN,
Assistant General Counsel,

ROMAN BECK,
PLATONIA P. KALDES,
Attorneys,
National Labor Relations Board.

MARCH 1943.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., 1940 ed., Sec. 151, *et seq.*), are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *

No. 10342

IN THE
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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

POLSON LOGGING COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF OF POLSON LOGGING COMPANY
RESPONDENT

FILED

MAY - 3 1943

PAUL F. O'BRIEN,
CLERK

R. W. MAXWELL,
Attorney for Respondent.

804 White Building,
Seattle, Washington.

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Attorney for Respondent.

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INDEX

	<i>Page</i>
Opinion Below	1
Jurisdiction	1
Statement of the Case	1
Respondent's Designation of Points.....	4
Summary of Argument	4
Argument	5
I. The Board erred in admitting testimony over respondent's objections and in refusing to grant respondent's motion to strike said testimony admitted over respondent's objection.....	5
II. The Board's finding that respondent interfered with, restrained and coerced its employees in the rights granted by Section VII of the National Labor Relations Act is not supported by substantial evidence	6
III. The Board's finding that Messrs. Lytle and Reece were discharged for union activity or membership is contrary to the evidence and not supported by substantial evidence	13
Appendix	16

TABLE OF CASES

<i>First Unitarian Soc. v. Faulkner</i> , 91 U.S. 415, 23 L. ed. 283	5
<i>National Labor Relations Board v. Thompson Products, Inc.</i> (U.S. C.C.A. 6) 97 F.(2d) 13	6-7, 14, 15
<i>U. S. v. Boyd</i> , 5 How. (U.S.) 29, 12 L. ed. 36.....	5
<i>Washington, Virginia & Maryland Coach Co. v. N. L. R. B.</i> , 301 U.S. 142, 147, 57 S. Ct. 648, 650, 81 L. ed. 965	7

TEXTBOOKS

20 Am. Jur. Evidence Sec. 597.....	5
------------------------------------	---

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U.S.C., 1940 ed., Sec. 151, *et seq.*) (See Appendix) 1, 6, 14, 15, 16

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OPINION BELOW

The opinion and Order of the National Labor Relations Board (R. 44-79) is reported in 40 N.L.R.B. 736.

JURISDICTION

Respondent adopts the statement on Jurisdiction set out in Petitioner's (Appellant's) brief.*

STATEMENT OF THE CASE

All employees of the logging operation of the Polson Logging Company constitute a single unit for the

*Pertinent sections of the Act are printed in the Appendix to this brief.

purpose of collective bargaining (R. 49 and 50—note 3). Since 1937 the Polson Logging Company has bargained collectively with the International Woodworkers of America, affiliated with the CIO, for all employees including those employed in the logging railroad classifications (R. 49).

In February, 1940, employees employed in the logging railroad classification wishing to join the Railroad Brotherhoods started organizing for that purpose (R. 138-139). By March 1, 1940, logging railroad employees had signed up with the Trainmen or or the Firemen and had formed a committee to prepare and submit to the Company a working agreement and a request that the Company recognize the train crews as constituting two separate units for the purpose of collective bargaining (R. 156).

On May 18, 1940, this committee submitted the agreement to the Company and requested it be accepted and signed (R. 95). The Company stated that the train crews were within the bargaining unit which had been established since 1935 and they would have to seek legal advice before answering (R. 142), and promised to give the Union a written answer (R. 144). The Company's written answer stated that the request of the Brotherhood Unions raised a question which could only be settled by agreement between the Unions concerned (International Wood Workers and Brotherhood Unions), or, failing in an agreement, by the National Labor Relations Board (Bd. Ex. 3) (R. 93-94). The representation question was submitted to the National Labor Relations Board which, on April 24, 1941, rendered its decision,

holding that the bargaining units contended for by the Trainmen and the Firemen and Engineers were inappropriate and dismissing the petitions of the two Brotherhood Unions (R. 50—Note 3).

On May 21, 1940, Messrs. Lytle and Reece, employed as brakemen on the logging railroad, failed to flag the Axford Prairie Crossing (crossing of main coast highway, Olympic Highway, and Company's railroad) as required by the Company's safety rules (R. 65-66, Board Finding). Both were discharged for failure to comply with the safety rule requiring the flagging of grade crossings of the Olympic Highway and the Company's logging railroad (R. 131-133, Bd. Ex. 5 and 6).

On July 8, 1940, a charge of unfair labor practice was filed with the Board. The charge case was held in abeyance pending the hearing of the representation case decided April 24, 1941 (R. 1, 44, 50). On June 30, 1941, the Brotherhood of Trainmen filed an amended charge (R. 3, 44) alleging Messrs. Lytle and Reece were discharged because of their membership in and activities on behalf of the Brotherhood of Railroad Trainmen.

A complaint was issued by the Board (R. 4 to 9). Respondent answered denying the unfair practices charged in the complaint (R. 9 to 11). After hearings the Board found that Messrs. Lytle and Reece had failed to flag the Axford Prairie Crossing, thus violating the Company's safety rule (R. 65-66), but held the discharge was for Union membership and activity and ordered reinstatement with back pay (R. 73). The Board also found that the Company had

discouraged membership in the Brotherhood Unions and issued a cease and desist order (R. 73-74).

RESPONDENT'S DESIGNATION OF POINTS

The respondent submitted its designation of points (R. 472-473) and will urge points I, III, and IV.

SUMMARY OF ARGUMENT

I. Respondent's objection to and motion to strike the testimony of C. B. Groves (Tr. 162-65) (R. 217-220) should have been sustained for the reason that the agency of Vic Lehman to speak for and bind the Company was not shown.

II. The findings of fact with respect to the unfair labor practices are not supported by substantial evidence. No unfair labor practice is shown by substantial evidence.

III. Since the Board's Order is not supported by substantial evidence it is invalid and should not be enforced.

ARGUMENT

I.

The Board erred in admitting testimony (Tr. 162-165, line 22) (R. 217-220) over respondent's objections and in refusing to grant respondent's motion to strike said testimony admitted over respondent's objection.

At the hearing respondent objected to the testimony of C. B. Groves, an employee employed in the railroad classification as a brakeman, regarding conversation with Vic Lehman, also an employee of the Company (R. 217). Vic Lehman is supposed to have told Mr. Groves to be careful what he said about the Brotherhoods or he might be discharged, to which Mr. Groves replied, "I don't think so." Respondent assigned as grounds for its objection the failure of the Board to show that Mr. Lehman was authorized to speak for or bind the Company or that the statement, if made, was within the authority of Vic Lehman or authorized by the Company (R. 217, 218).

The existence of an agency must be established before statements or declarations are admissible against the principal.

First Unitarian Soc. v. Faulkner, 91 U.S. 415, 23 L. ed. 283;

U. S. v. Boyd, 5 How. (U.S.) 29, 12 L. ed. 36.

The burden of proof lies upon the party who introduces the statements of an agent for the purpose of binding the principal to show the declarations were within the agent's authority (20 Am. Jur. Evidence Section 597).

The record is devoid of any showing that Vic Leh-

man, if he made the statement testified to by Mr. Groves, was acting within his authority or as an agent of the respondent. The burden was upon the Board to show by substantial evidence, not only that Vic Lehman made such statement but that it was made within the course and scope of his authority before respondent can be charged therewith. The Board failed to make this showing and respondent's objection (R. 217) and motion to strike (R. 218) should have been sustained.

II.

The Board's finding that respondent interfered with, restrained and coerced its employees in the rights granted by Section VII of the National Labor Relations Act is not supported by substantial evidence.

The Board predicated its finding that respondent had interfered with the rights of the employees guaranteed by Section 7 of the National Labor Relations Act upon the testimony of Mr. Wood, a locomotive engineer, and Nels Hill, a brakeman, Tony Plesha, employed in the railroad construction crew, and the alleged statement of Vic Lehman, testified to by C. B. Groves.

Respondent does not deny the rule that administrative findings if supported by *substantial evidence* are conclusive (italics ours). Respondent does contend that the testimony relied upon by the Board does not meet the test of substantial evidence.

Substantial evidence means more than a mere scintilla. It excludes vague, uncertain, or irrelevant matter. As stated by Judge Hamilton in the decision in the case of the *National Labor Relations Board v.*

Thompson Products, Inc. (U.S. C.C.A. 6) 97 F.(2d) 13, 15:

“Substantial evidence implies a quality of proof which induces conviction and makes an impression on reason. It means that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions, and conclusions to be drawn therefrom, and considering them in their entirety in relation to each other arrives at a fixed conviction.”

See also

Washington, Virginia & Maryland Coach Co. v. N. L. R. B., 301 U.S. 142, 147, 57 S. Ct. 648, 650, 81 L. ed. 965.

We shall review briefly the testimony relied upon by the Board to support its finding that respondent interfered with the rights of its employees.

Mr. Wood testified to an alleged conversation with Mr. Ellingson, assistant superintendent (R. 180). Mr. Ellingson is supposed to have inquired about the engine upon which Mr. Wood was working, and stated that there was lots of repair work to be done but that when this work would be done was uncertain because of the Brotherhood trouble (R. 180-181). Mr. Wood testified further that Mr. Ellingson said that Mr. Groves was a trouble maker. Mr. Ellingson denied having made the statements attributed to him by Mr. Wood (R. 281-282).

On cross examination Mr. Wood admitted that Mr. Ellingson did not attribute trouble or anticipated trouble to the Brotherhoods (R. 183). The Board, in its decision, found that Mr. Ellingson had threat-

ened to shut down the Company's operation as a consequence of Brotherhood activities (R. 53). On this point we set forth an excerpt of Mr. Wood's testimony on cross examination:

"Q. Did he (Mr. Ellingson) say that the Company would shut the whole thing down if there was any trouble?

A. No, he did not." * * * (R. 183)

"Q. Did Mr. Ellingson say that if the men joined the Brotherhood they would shut the plant down?

A. No, sir.

Q. Did he say they would curtail the Company's operations?

A. Not at all." (R. 183)

Mr. Wood, on cross examination, further testified that Mr. Ellingson did not threaten action against Mr. Wood if he joined the Brotherhood nor did he advise him not to join the Brotherhood (R. 184).

The Board relied upon the testimony of Mr. Wood to the effect that Mr. Ellingson said C. B. Groves was leading the men astray. The record is devoid of any showing that C. B. Groves was at all active in Brotherhood organization efforts. As a matter of fact C. B. Groves did not engage in activities for and on behalf of the Brotherhoods. In what respect Mr. Groves is supposed to have led the men astray is left entirely to conjecture. Mr. Ellingson denied having made this statement (R. 381-382).

The Board cannot accept the testimony of its own witness which serves its end and disregard testimony of the same witness inconsistent with the ultimate

finding of the Board. In relying upon the testimony of Mr. Wood to support its finding the Board was pleased to forget and disregard what he said on cross examination. We submit the testimony of Mr. Wood to support the finding of interference does not meet the test of substantial evidence.

The Board relied upon the testimony of Mr. Harlan, a brakeman. According to this witness, Mr. Ellingson stated that the Northern Pacific was going to take over the railroad operations of the Polson Logging Company. Mr. Harlan testified that he had talked to no one about the Brotherhoods except Mr. Lytle (R. 262), another employee, employed in the railroad classification. Nevertheless, the Board found that Mr. Ellingson had discussed the Brotherhood with Mr. Harlan and had stated that C. B. Groves was leading the men astray, and that the Northern Pacific was going to take over the railroad operations. On direct examination Mr. Harlan testified:

“I don’t think we ever talked to Mr. Ellingson,”

and again:

“I don’t think I ever talked to Mr. Ellingson; I know, not about the Brotherhood.” (R. 265)

We submit that the testimony of Mr. Harlan not only fails to relate the statement attributed to Mr. Ellingson to the train crew’s membership or organizational efforts in the Brotherhoods but positively negatives such finding. It does not meet the test of substantial evidence.

Nels Hill’s (a brakeman) testimony was accepted by the Board to show that Mr. Ellingson had said

there were two unions in existence among the employees and that they were fighting one another and that "some day they would all be going down the road." The testimony of Nels Hill should be reviewed in its entirety on this point (R. 265, 285). It was denied by Mr. Ellingson (R. 387, 388) and Frank Landi (R. 416, 417, 418, 419), the foreman of the section crew to whom the statement is alleged to have been made.

On the occasion testified to by Mr. Hill there had been two wrecks on the Company's logging railroad (R. 267). In response to the Board counsel's question as to whether Mr. Ellingson mentioned unions during the conversation, Mr. Hill replied, "No, he didn't mention unions" (R. 269). Much of Mr. Hill's testimony was elicited by leading questions of the Board's counsel. This is particularly true of the testimony relied upon by the Board to support its finding.

Mr. Hill's testimony does not meet the test of substantial evidence.

Mr. Plesha, employed on the railroad construction crew, testified that Mr. Ellingson asked what the men were going to do if the Northern Pacific Railroad took over the Company's logging railroad. On cross examination he refused to say that the statement was made because of any Brotherhood organizational efforts or activities, or membership by the men (R. 312).

Mr. Ellingson denied the statements attributed to him by Mr. Plesha. He specifically stated that Mr. Plesha asked him if the Northern Pacific was going to take over the railroad operation (R. 389).

An engineer, Mr. Fenton, was supposed to have been present when Mr. Ellingson made the statement attributed to him by Mr. Plesha. It is significant that the Board did not call Mr. Fenton to whom the statement was allegedly addressed to testify thereto.

We submit that the testimony of Mr. Plesha does not meet the test of substantial evidence.

The Company's record of labor relations and Union dealings is worthy of considerable weight. The employees were organized in 1935 as members of the AF of L. In 1937 the employees transferred their affiliation to the CIO. The Company has bargained collectively with both Unions. Yet, with a background free from anti union attitude or activity the Board found that in 1940 this Company had set about to engage in a program to interfere with the rights of their employees to join unions and bargain collectively. As we have pointed out the evidence relied upon by the Board is not substantial and in every instance the testimony of the Board's witnesses was inconsistent with the finding of the Board.

It is significant that the unfair labor practice charge in this case was filed on July 8, 1940 (R. 44). On the same date the Brotherhood of Trainmen and the Brotherhood of Enginemen filed separate petitions alleging that a question of representation of the respective employees had arisen and sought an order of the National Labor Relations Board certifying the two Brotherhoods as bargaining agents for the trainmen and firemen and enginemen respectively. Nothing was done regarding the unfair practice charge filed on the same day. Instead, the Board, for some

reason, proceeded to hear and decide the representation case and on April 24, 1941, handed down a decision holding that employees employed as trainmen and as firemen and as enginemen did not constitute separate units for the purpose of collective bargaining and denied the petitions (R. 50, footnote 3). Following this decision and on June 30, 1941, an amendment to the original unfair practice charge, filed July 8, 1940, was filed. It is on the basis of the amended charge that the Board took this case to a hearing. It is a well established policy of the Board to deny a hearing in a representation case if a charge case is pending. The only conclusion that can be drawn from the unusual developments and procedure herein is that the charge was filed as means of bringing pressure upon the Company to grant recognition to the Brotherhood unions despite the existing labor agreement with the IWA Union which covered employees employed in the railroad classifications.

Apparently, after investigation the National Labor Relations Board did not find sufficient facts to support the unfair labor practice charge filed on July 8, 1940. It is significant that the original charge, filed July 8, 1940, and the amended charge, filed June 30, 1941, are identical word for word. The only difference between the two is the paragraphing. It must be assumed that the Board carried out its duty of investigating the charges made on July 8, 1940, and based upon that investigation deemed these charges to be without foundation.

III.

The Board's finding that Messrs. Lytle and Reece were discharged for union activity or membership is contrary to the evidence and not supported by substantial evidence.

The respondent's answer to the Board's complaint admitted that Messrs. Lytle and Reece were discharged. The respondent denied that the discharge was for union membership or activity and alleged the discharge was because of the failure of these men to observe and abide by safety regulations (R. 10 and 11).

Although the Board through its witnesses at the hearing sought to establish the fact that the safety regulations of the Company did not require the brakeman to flag principal crossings of the Olympic highway and the Company's logging railroad, the Board found that the safety rule did require the brakemen to be on the front end whenever the train was pushing one or more cars ahead of the engine and to signal the engineer either to stop or proceed depending upon the conditions observed by them (R. 65).

Messrs. Lytle and Reece were discharged for their failure to abide by such rule (R. 131 and 133, Bd. Ex. 7 and 8). Despite the finding by the Board that the safety rule did exist and that these employees did not abide by it, the Board, nevertheless, held the discharge was for union membership and activities. The Board is not free to indulge in conjecture but is bound by the record. To support its Order the Board indulged in some fanciful reasoning that under the circumstances existing the infraction of the safety rule was

inconsequential (R. 66). The Act does not authorize the Board to pass judgment as to the necessity for any safety rule or regulation yet this is the basis upon which the Board refused to find that safety rule violation by Messrs. Lytle and Reece was the grounds for the discharge.

It is surprising that a rule made to protect the Company and the public using state arterial highways was so lightly treated by the Board. In the Board's decision it states "We are unable to assume that the incident in question was the first breach in that rule which had been observed by the respondent's officials" (R. 67). The Board is not permitted to indulge in assumptions of facts not shown in the record. Respondent's witnesses including Company officials testified that they had not observed prior infractions of this rule (R. 366-7, 408, 437, 440, 441). Although the Board sought to prove by its witness that officials of the Company had ridden on trains across highway crossings when the brakemen did not flag it, the Board witness admitted that the crossings were flagged (R. 463).

The safety rule requiring the flagging of the crossings was established to the satisfaction of the Board. Its violation was admitted by the employees concerned and the Board so found. Under the circumstances the discharge was rightful and the Board is not permitted to predicate its decision upon whether or not the violation of the employees' duty was serious. (*N.L. R.B. v. Thompson Products, Inc.* (C.C.A. 6) 97 F. (2d) 13, 17.

We submit that the Order of the Board directing the reinstatement of Messrs. Lytle and Reece is not supported by substantial evidence.

CONCLUSION

The evidence upon which the Board relied to support this finding does not possess that "quality of proof which induces conviction and makes an impression on reason" (*National Labor Relations Board v. Thompson Products Inc.* (U.S. C.C.A. 6) 97 F.(2d) 13).

Respectfully submitted,

R. W. MAXWELL,

Attorney for Respondent.

APRIL, 1943.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U.S.C., 1940 ed., Sec. 151, *et seq.*), are as follows:

“SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

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* * * * *

“(3) By discrimination in regard to hire, or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *”

